In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-114

UNITED STATES OF AMERICA, PETITIONER

v.

FELIX HUMBERTO BRIGNONI-PONCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

November 1972 Grand Jury

UNITED STATES OF AMERICA, PLAINTIFF, v. FELIX HUMBERTO BRIGNONI-PONCE, DEFENDANT.	No. 14805 Criminal INDICTMENT Title 8, U.S.C., Sec. 1324(a)(2)—Illegal Transportation of Aliens

The grand jury charges:

COUNT ONE

On or about March 11, 1973, within the Southern District of California, defendant

FELIX HUMBERTO BRIGNONI-PONCE

knowing that an alien, namely,

Elsa Marina Hernandez-Serabia

was then in the United States in violation of law and having reasonable grounds to believe that said alien's entry into the United States occurred less than three years prior to the aforesaid date, did transport and move, and attempt to transport and move, said alien(s) within the United States, in furtherance of such violation of law; in violation of Title 8, United States Code, Section 1324(a)(2).

COUNT TWO

On or about March 11, 1973, within the Southern District of California, defendant

FELIX HUMBERTO BRIGNONI-PONCE

knowing that an alien, namely,

Jose Nunez-Ayala

was then in the United States in violation of law and, having reasonable grounds to believe that said alien's entry into the United States occurred less than three years prior

to the aforesaid date, did transport and move, and attempt to transport and move, said alien within the United States, in furtherance of such violation of law, in violation of Title 8, United States Code, Section 1324(a)(2).

A TRUE BILL:

Leo H. Johnson
Foreman

/s/ Harry D. Steward
HARRY D. STEWARD
United States Attorney

EXCERPTS FROM THE TRIAL TRANSCRIPT

* * * * *

DIRECT EXAMINATION OF TERRANCE J. BRADY

* * * * *

By MR. SHANAHAN:

Q. Mr. Brady, what is your occupation?

A. Border Patrol Agent.

Q. And how long have you been so employed?

A. Four and a half years.

Q. And as a Border Patrol Agent, what are your duties?

A. To protect and prevent the illegal entry of aliens and smuggling of aliens into the United States.

Q. And were you so employed on March 11, 1973?

A. I was.

Q. And where were you so employed, sir?

A. San Clemente station, California.

Q. And were you on duty on that particular day?

A. I was, sir.

Q. And what were your duties on that particular day?

A. We were observing traffic. Due to the checkpoint, which we usually check traffic on the highway was closed, we were observing traffic passing through the checkpoint area.

Q. Now, where is that area you just referred to?

A. It's on the highway about four miles south of the City of San Clemente.

Q. What highway?

A. Interstate Highway 5.

Q. And you were observing traffic heading in which direction?

A. Northbound.

Q. And you mentioned that the checkpoint is usually in operation. Would you explain what the checkpoint is, and how it is set up when it is in operation?

A. The San Clemente station, the Border Patrol is a traffic check operation, and we check the northbound traffic, routine immigration inspection as to citizenship of the occupants, and we search the vehicles for illegal aliens.

Q. This is when the checkpoint is in operation?

A. Yes, sir.

Q. Do you stop traffic there?

A. Yes, sir. They come to a complete stop.

Q. Is there some type of building or structure that is visible when the checkpoint is in operation?

A. There are three signs that warn the motorists to stop for inspection ahead.

Q. Is there anything to indicate to the motorist whether or not the checkpoint is in operation?

A. Yes, sir. Flashing lights, and the signs which indicate for the motorist to come to a stop.

Q. Is there any type of van, or anything like this, that you use at the checkpoint?

A. We place two vehicles on the highway in the lanes, when we are checking two lanes; and, then, they are facing south, and they have red lights flashing.

Q. Again, this is when the checkpoint is in operation?

A. Yes, sir.

Q. On this particular day, were any of these lights on, or the vans out in the road at that point?

A. No, sir.

Q. Now, how often is the checkpoint in operation on a normal basis?

A. Constantly.

Q. As I understand it, it wasn't in operation at this time. When is the checkpoint not in operation?

A. Due to lack of manpower and inclement weather.

Q. What was the weather like on this particular day?

A. It was inclement weather.

Q. And is this the normal procedure that you don't have it up on inclement weather?

A. Yes, sir. Never on inclement weather.

Q. Now, where were you in relation to the checkpoint?

A. We stand off of the highway right at the checkpoint in patrol cars observing the northbound traffic.

Q. And was anyone else with you?

A. Agent Harkins.

Q. And what did you observe during this period? Did you observe anything unusual?

A. We observed the cars traveling north, and we observed a Chevrolet going through that we wished to inspect.

Q. Approximately what time was this?

A. I don't recall. It was during the darkness.

Q. Early evening hours, is that correct?

A. I believe so.

Q. And what did you do?

A. We pursued the vehicle and stopped it.

Q. And what happened when you stopped the vehicle?

A. Agent Harkins approached the driver's side, and I stood back to—for his protection backing him up on the right rear portion of the vehicle.

Q. How many people were in the vehicle?

A. Three.

Q. And after Agent Harkins went to the driver, what did you do?

A. I went to the passenger side and talked to the passengers in the vehicle.

Q. Without telling me what they said, was the conversation in English or Spanish?

A. Spanish.

Q. With both people?

A. With both people.

Q. And to your knowledge, could they speak any English?

A. To my knowledge they didn't know—understand English at all.

Q. And what did you question them concerning?

A. Their citizenship.

Q. Did you request papers?

A. I did.

Q. And did you receive any papers?

A. No papers.

Q. Now, after this conversation—let me back up a little bit.

Did you observe the driver?

A. Yes, sir.

Q. And would you recognize the driver if you saw him in court again?

A. I would, sir.

Q. And if you see the driver in this courtroom, point him out and describe what he is wearing.

A. He's seated at defense table, to the left side of the counsel.

THE COURT: May the record reflect the identification of the defendant by the witness.

MR. SHANAHAN: Thank you, your Honor.

By MR. SHANAHAN:

Q. All right. After having these conversations, what did you do?

A. I established that the two passengers were in the United States illegally.

MR. RAGEN: Your Honor, I would object to that, and move it be stricken. It's hearsay.

THE COURT: Overruled.

By MR. SHANAHAN:

Q. What did you do after you had this conversation?

A. After I established that they were illegal aliens in the United States, I stepped to the rear of the vehicle where the defendant was standing with Agent Harkins, where they were inspecting the trunk; and I warned the defendant as to his rights.

Q. And what rights were those?

A. They are Miranda rights.

Q. All right. Do you have some type of card, or something that you used to give those rights?

A. Yes, sir.

Q. And after—after you gave these rights, what occurred?

A. We placed the defendant in custody, and the passengers in his vehicle in custody, and returned them to the San Clemente Border Patrol station.

Q. Had you ever seen the defendant on prior occasions?

A. I don't recall.

MR. SHANAHAN: I have no further questions at this time, your Honor.

THE COURT: Cross-examine.

CROSS-EXAMINATION

By MR. RAGEN:

Q. Agent Brady, what was the reason you stopped the car?

A. Routine immigration inspection.

Q. You said there was nothing unusual about it, other than it was traveling north, is that correct?

A. That's true.

Q. What type of car was this?

A. Chevrolet.

Q. Chevrolet. Do you know what year that was?

A. I think I recall that it was a 1969 Chevrolet.

Q. Could you see the occupants of the car from your position on the roadway?

A. Yes, sir.

Q. You could see inside the car?

A. Yes, sir.

Q. Did you use a light to do that?

A. None, other than the headlights of the patrol car.

Q. If I understand you correctly, then, your car is parked at a ninety degree angle to the freeway?

A. Yes, sir.

Q. And so as cars drive by your lights shine in?

A. Yes, sir.

Q. Did these people inside the car appear to be of Mexican descent to you?

A. Yes, sir.

Q. And that, if there was any, appeared to be the reason that you stopped them?

A. Yes, sir.

Q. Did you attempt to speak with the passengers in this car in English?

A. When I approached the right side, identified myself as an immigration officer; and, then, I asked them their citizenship in English, and that is routine.

Q. And what was their response?

A. They didn't understand English.

Q. They said that?

A. In Spanish.

Q. I see. And you indicated you used a card to advise them of their rights?

A. Yes. Well, it's a paper in English and in Spanish.

Q. Did you hand that to the defendant, Mr. Brignoni, or did you read it to him?

A. I read it to him.

Q. Do you have that card here today?

A. Yes, sir.

Q. Is that a card that is assigned to you that you keep on your person at all times?

A. Yes, sir.

MR. RAGEN: I have nothing further, your Honor.

* * * * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

(HON. HOWARD B. TURRENTINE)

UNITED STATES OF AMERICA, PLAINTIFF,	Criminal No. 14805
v.	STIPULATION AND ORDER
FELIX H. BRIGNONI, DEFENDANT.	

It is hereby agreed by and between the parties and their counsel that the defendant's motion to suppress the aliens found in the stop of defendant's car, which motion is based upon the dissenting opinion in *United States v. Almeida-Sanchez*, 452 F.2d 459 (9th Cir. 1971), may be heard at the time of trial.

Dated:

/s/ Donald F. Shanahan
DONALD F. SHANAHAN
Assistant United States Attorney

/s/ Frank J. Ragen
FRANK J. RAGEN
Federal Defenders of San Diego, Inc.
Attorneys for Defendant

The above motion to suppress is denied.

Dated: JUL 13, 1973

/s/ Howard B. Turrentine
HOWARD B. TURRENTINE
United States District Court Judge

[JUDGMENT AND COMMITMENT]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
CALIFORNIA

UNITED STATES OF AMERICA
v.
FELIX HUMBERTO BRIGNONI-PONCE
No. 14805—Criminal

On this 14th day of May, 1973 came the attorney for the government and the defendant appeared in person and by counsel, Frank Ragen of Federal Defenders,

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty has been convicted of the offense of illegal transportation of aliens, in violation of 8 USC 1324(a)(2), as charged in count 1 and 2 of the indictment in two counts, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that on count #1 the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FOUR (4) YEARS and pursuant to 18 USC 4208(a)(2), the Court specifies that the defendant shall become eligible for parole at such time as may be determined by the Board of Parole, and on count number two the imposition of sentence is suspended and the defendant placed on probation for a period of FIVE (5) years, on condition that he obey all laws, Federal, State, or Municipal, that he comply with all lawful rules and regulations of the Probation Department. The period of probation is to commence upon the defendant's release from confinement or parole, whichever comes first.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Mar-

shal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Howard B. Turrentine
HOWARD B. TURRENTINE
United States District Judge.

Filed: May 14, 1973
William W. Luddy

By: Richard I. Bellman,
Deputy Clerk.

United States Court of Appeals for the Ninth Circuit

No. 73-2161

UNITED STATES OF AMERICA, APPELLANT

v.

FELIX HUMBERTO BRIGNONI-PONCE, APPELLANT

OPINION

[Decided June 14, 1974]

Appeal from the United States District Court for the Southern District of California

Before CHAMBERS, MERRILL, KOELSCH, BROWNING, DUNIWAY, ELY, HUFSTEDLER, WRIGHT, TRASK, CHOY, GOODWIN, WALLACE, and SNEED, *Circuit Judges.*

GOODWIN, *Circuit Judge:* Felix Humberto Brignoni-Ponce appeals his conviction for transporting aliens in violation of 8 U.S.C. § 1324(a)(2). Two illegal aliens were discovered following a warrantless stop of his car near the San Clemente immigration checkpoint. The government contends that even if recent decisions by the Supreme Court and this court have stripped the Border Patrol of its authority to stop vehicles and search them for aliens, the Border Patrol still retains the authority, exercised in this case, to stop and interrogate any person believed to be an alien as to his right to remain in the United States. We reject that contention and reverse the conviction.

On March 11, 1973, the San Clemente immigration checkpoint, located in San Onofre, California, approximately 65 miles north of the Mexican border on Interstate 5 between San Diego and Los Angeles, was closed because of inclement weather. During the early morning hours, an agent of the Border Patrol was observing northbound traffic from his patrol car, parked at a ninety-degree angle to the interstate highway. Observing a passing vehicle whose occupants appeared to be of Mexican descent, the agent pursued the car and stopped it. Investigation soon revealed that the

two passengers were illegally in the United States. They and the driver, Brignoni-Ponce, were then arrested.

In *United States v. Peltier*, F. 2d (9th Cir., May 9, 1974) (en banc), this court held that the rule announced by the Supreme Court in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), applied retroactively to all cases involving roving-patrol searches which were pending on appeal at the time that *Almeida-Sanchez* was announced. However, in *United States v. Bowen*, F. 2d (9th Cir., May 9, 1974) (en banc), we also held that, although searches by border-patrol agents at fixed checkpoints violated the Fourth Amendment, *Almeida-Sanchez* would not be applied retroactively to fixed-checkpoint searches conducted prior to the date of decision of *Almeida-Sanchez*.

The stop of Brignoni-Ponce's car was made before the decision in *Almeida-Sanchez* was announced. The first question, then, is whether or not the stop was more like one by a roving patrol than one at a fixed checkpoint. Although we held in *United States v. Morgan*, F. 2d (9th Cir., June 14, 1974) (en banc), that searches at the San Clemente checkpoint were fixed-checkpoint searches rather than roving-patrol searches. Brignoni-Ponce's car was not stopped at the checkpoint. Rather, because the checkpoint was closed and no marked barricades designed to impede vehicular traffic were in place, Brignoni-Ponce would have proceeded undisturbed except for the decision to pursue him. His car was overtaken and stopped north of the closed checkpoint. Although the line between a roving-patrol stop and a fixed-checkpoint stop is not a clear one, we hold that pursuing a passing car and flagging it to the side of the road is conduct more characteristic of a roving-patrol stop than of a fixed-checkpoint stop. *See United States v. Grijalva-Carrera*, F. 2d (9th Cir., June 14, 1974) (en banc); *United States v. Bowen*, F. 2d at (slip opinion at 4-5).

The government contends, however, that even if this court holds that the stop was a roving-patrol stop, that holding would not dispose of this case. It argues that *Almeida-Sanchez*, *Peltier*, *Bowen*, *Morgan*, and *Grijalva-Carrera* all involved the constitutionality of searches without probable cause, pursuant to 8 U.S.C. § 1357(a)(3). This case, by contrast, involves merely a stop, pursuant to 8 U.S.C. § 1357(a)(1), for the purpose of interrogating a person believed to be an alien regarding his right to remain

in the United States. In support of its argument, the government cites the recent decision by the Court of Appeals for the Tenth Circuit in *United States v. Bowman,* 487 F. 2d 1229 (10th Cir. 1973), holding that *Almeida-Sanchez* applied only to searches under § 1357(a)(3) and not to stops for interrogation under § 1357(a)(1).

We cannot adopt the approach taken by our brothers on the Tenth Circuit. Section 1357(a)(1), unlike § 1357(a)(3), has no requirement that the stop be within a "reasonable distance" from the border. Under the Tenth Circuit's view, immigration officials could stop a vehicle anywhere in the country in order to interrogate its occupants as to their right to be in the United States, without a warrant, without probable cause, and without even a reasonable suspicion that any of the occupants are illegal aliens.

Such stops are entirely inconsistent with the Supreme Court's opinion in *Almeida-Sanchez.* Although the facts of *Almeida-Sanchez* called into question only that portion of § 1357(a) involving the Border Patrol's authority to stop and search vehicles, the Court's opinion reflects at least as much concern with the initial stop as with the subsequent search. *See, e.g.,* 413 U.S. at 268:

> "* * * It is undenied that the Border Patrol had no search warrant, and that there was no probable cause of any kind for the *stop* or the subsequent search * * *." (Emphasis added.)

And 413 U.S. at 272:

> "* * * [N]either this Court's automobile search decisions nor its administrative inspection decisions provide any support for the constitutionality of the *stop* and search in the present case * * *." (Emphasis added.)

The Court ended its opinion, 413 U.S. at 274-75, by quoting from *Carroll v. United States,* 267 U.S. 132 (1925), as follows:

> "* * * It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be stopped in crossing an interna-

> tional boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise * * *." 267 U.S. at 153-54.

Had the Court intended to leave intact the government's asserted right to stop cars on mere suspicion anywhere in the country in order to interrogate their occupants as to their right to remain in the United States, we doubt that it would have quoted this language from *Carroll*. Even more than immigration searches which had to be conducted within an area no more than 100 miles from the border, these immigration stops offend the "right to free passage without interruption" of "those lawfully within the country."

Moreover, the Tenth Circuit's position is inconsistent with settled law of this circuit. In *United States v. Mallides*, 473 F. 2d 859, 861 (9th Cir. 1973), we held that the stop of a vehicle by police officers, even for the limited purpose of questioning its occupants, must be based upon a "founded suspicion." *See also United States v. Ward*, 488 F. 2d 162, 168-69 (9th Cir. 1973) (en banc). This holding was subsequently applied to investigatory stops by border-patrol agents. *See, e.g., United States v. Mora-Chavez*, — F. 2d — (9th Cir., Apr. 26, 1974); *United States v. Bugarin-Casas*, 484 F. 2d 853, 854 (9th Cir. 1973), *cert. denied*, — U.S. — (1974).

Likewise, the Court of Appeals for the District of Columbia Circuit has held that immigration officials, in accordance with § 1357(a)(1), may make forcible detentions of a temporary nature for the purposes of interrogation under circumstances creating a reasonable suspicion, not arising to the level of probable cause to arrest, that the individual so detained is illegally in this country. *Au Yi Lau et al. v. United States Immigration & Naturalization Service*, 445 F. 2d 217, 223 (D.C. Cir.) (later vacated as to one party only), *cert. denied*, 404 U.S. 864 (1971).

Here, the border-patrol agents who stopped Brignoni-Ponce's car did not possess facts which constituted a founded suspicion that he or his passengers were illegal aliens. All that they knew was that Brignoni-Ponce and his companions appeared to be of Mexican descent and were in a sedan traveling north on Interstate 5, approximately 65 miles north of the Mexican border. This is not enough. As we said in *United States v. Mallides:*

> "* * * [T]here is nothing suspicious about six persons riding in a sedan. The conduct does not become suspicious simply because the skins of the occupants are nonwhite * * *." 473 F. 2d at 861.

We hold, then, that the stop and interrogation of Brignoni-Ponce and the passengers in his car were illegal, and the fruits of the illegal conduct were inadmissible. *See United States v. Guana-Sanchez,* 484 F. 2d 590 (7th Cir. 1973), *petition for cert. filed* November 23, 1973 (U.S. No. 73-820).

Reversed and remanded.

United States Court of Appeals For the Ninth Circuit

No. 73-2161, DC No. 14805

UNITED STATES OF AMERICA, APPELLEE

v.

FELIX HUMBERTO BRIGNONI-PONCE, APPELLANT

JUDGMENT

Appeal from the United States District Court for the Southern District of California.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is

Reversed and Remanded.

A true copy
Attest June 20, 1974.

EMIL E. MELFI, JR.,
Chief Deputy and Acting Clerk.

RAY HEWITT,
Senior Deputy.

Filed and entered June 14, 1974.

SUPREME COURT OF THE UNITED STATES

No. 74-114

UNITED STATES,
Petitioner,

v.

FELIX HUMBERTO BRIGNONI-PONCE

ORDER ALLOWING CERTIORARI. Filed October 15, 1974

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth ..... Circuit is granted, and the case is set for oral argument in tandem with No. 73-2050 and No. 73-6848.

☆ U.S. Government Printing Office: 1974—563-035/64

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Constitution and statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

UNITED STATES OF AMERICA, PETITIONER

v.

FELIX HUMBERTO BRIGNONI-PONCE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra,* pp. 1a–6a) is not yet reported.

JURISDICTION

The *en banc* judgment of the court of appeals (App. B, *infra,* p. 7a) was entered on June 14, 1974. On July 10, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including August 13, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the warrantless stop of an automobile by Border Patrol officers, acting pursuant to their statutory authority to question persons in the vehicle whom they believe to be aliens concerning their right to be or remain in the United States, violates the Fourth Amendment's proscription against unreasonable searches and seizures and requires the suppression of evidence obtained as a result of the stop but without any subsequent search.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

1. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. Section 287(a) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1357(a), provides in pertinent part:

> Any officer or employee of the [Immigration and Naturalization] Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
>
> * * * * *
>
> (3) within a reasonable distance from any external boundary of the United

> States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; * * *.

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, respondent was convicted on two counts of transporting aliens who were present in this country illegally, in violation of 8 U.S.C. 1324(a)(2). He was sentenced to four years' imprisonment on count 1, subject to the immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2), and five years' probation on count 2.

1. The evidence at trial established that on March 11, 1973, Border Patrol Agents Brady and Harkins were on duty in a patrol car observing northbound traffic on Interstate Highway 5 approximately four miles south of San Clemente, California (Tr. 15–16).[1]

[1] The officers were parked off the highway at the site of a permanent immigration checkpoint which was closed because of inclement weather (Tr. 16–18). The patrol car was parked at a 90-degree angle to the highway with its headlights on (Tr. 22). The officers were able to see the occupants of passing vehicles (*ibid.*). A description of the San Clemente checkpoint and its normal mode of operation is set forth in *United States* v. *Baca*, 368 F. Supp. 398, 410–411 (S.D. Cal.). The checkpoint is located approximately 62 air miles and 66 road miles north of the Mexican border (*id.* at 410).

During the early evening hours, they observed traveling north a vehicle driven by respondent and containing two passengers (Tr. 18–19, 20–22). The officers pursued and stopped the car for a "routine immigration inspection" (Tr. 19, 21–22) because they observed that its three occupants appeared to be of Mexican descent (Tr. 22–23).

Upon questioning the passengers in the vehicle in English and Spanish concerning their citizenship, the officers discovered that they spoke no English and had no papers authorizing them to be in the United States (Tr. 19–20). Respondent and the passengers were then arrested (Tr. 21). At trial, both passengers testified that they are Mexican citizens who had entered the United States illegally (Tr. 24–25, 57, 63–64).

The parties agreed by stipulation that respondent's motion to suppress the evidence derived from the stop of his vehicle could be heard and decided at the time of trial (Clerk's record on appeal, p. 35). The district court denied the motion (*ibid.*).

2. Subsequent to respondent's trial, this Court decided *Almeida-Sanchez* v. *United States*, 413 U.S. 266, which held that a warrantless roving patrol *search* of an automobile for concealed aliens, conducted by Border Patrol officers acting without probable cause or reasonable suspicion to believe that the vehicle contained any aliens present in this country unlawfully, violated the Fourth Amendment's proscription against unreasonable searches and seizures. The Ninth Circuit subsequently held that the ruling in *Almeida-Sanchez* should be applied retroactively to require the

exclusion of evidence seized in similar roving patrol searches conducted prior to the date of this Court's decision. *United States* v. *Peltier,* C.A. 9, No. 73–2509, decided May 9, 1974, pending on the government's petition for a writ of certiorari, No. 73–2000. It also held, however, that *Almeida-Sanchez* should apply only prospectively with respect to searches conducted at fixed immigration checkpoints. *United States* v. *Bowen,* C.A. 9, No. 72–1012, decided May 9, 19774, pending on the defendant's petition for a writ of certiorari, No. 73–6848.[2]

In the present case, the court of appeals, sitting *en banc,* reversed respondent's conviction (App. A, *infra,* pp. 1a–6a). It held first that the Border Patrol officers' conduct in pursuing respondent's vehicle and flagging it to the side of the road was "more characteristic of a roving-patrol stop than of a fixed-checkpoint stop" (*id.* at 3a). Therefore, under the court of appeals' decision in *Peltier,* the principles of *Almeida-Sanchez* apply even though the stop occurred prior to the date of this Court's decision in that case (*id.* at 2a–3a).

[2] The Ninth Circuit had first held in *Bowen* that *Almeida-Sanchez* should be extended to invalidate warrantless, non-probable-cause searches of automobiles for aliens at fixed checkpoints. That ruling was later applied in a case involving a post-*Almeida-Sanchez* checkpoint search (*United States* v. *Ortiz,* C.A. 9, No. 74–1249, decided June 19, 1974). We have filed a petition for a writ of certiorari in *Ortiz* (No. 73–2050), in which we argue that warrants are not required for checkpoint searches of vehicles for concealed aliens and that, even if warrants are required, the ruling should not apply to checkpoint searches that occurred prior to the court of appeals' decision in *Bowen.*

The court next held that warrantless *stops* of vehicles, "without probable cause, and without even a reasonable suspicion that any of the occupants are illegal aliens [,] * * * are entirely inconsistent with the Supreme Court's opinion in *Almeida-Sanchez*" (*id.* at 3a–4a). The court of appeals acknowledged that *Almeida-Sanchez* involved a search rather than only a stop and that 8 U.S.C. 1357(a) gives Border Patrol officers authority not only to search vehicles for concealed aliens without a warrant but also "to interrogate any alien or person believed to be an alien as to his right to be or remain in the United States * * *." The court held, however, that this Court's opinion in *Almeida-Sanchez* "reflects at least as much concern with the initial stop as with the subsequent search" (App. A, *infra*, p. 4a).

The court concluded that a warrantless stop of a vehicle is permissible only if the officers have information that constitutes "a founded suspicion" that one or more occupants of the vehicle are aliens whose presence in this country is unlawful (*id.* at 6a). Although not disputing that the officers here had reason to believe that respondent and his passengers were aliens, the court held that they did not have a founded suspicion that the vehicle's occupants were present in this country *unlawfully*. It therefore concluded that "the stop and interrogation * * * were illegal, and the fruits of the illegal conduct were inadmissible" (*ibid.*).

The court refused to "adopt the approach taken by our brothers on the Tenth Circuit" (*id.* at 3a) in *United States* v. *Bowman*, 487 F. 2d 1229, in which that court held that the stopping of an automobile "for

the limited purpose of determining [the driver's] citizenship was entirely justified" under 8 U.S.C. 1357(a)(1) and is not barred by the Fourth Amendment or by the principles of *Almeida-Sanchez* (487 F. 2d at 1231).

REASONS FOR GRANTING THE WRIT

This case presents an important issue concerning the Border Patrol's authority, consistent with the Fourth Amendment, to employ a law enforcement method that has a significant role in the Border Patrol's program of deterring and detecting the unlawful entry and transportation of aliens in this country. That issue—which this Court did not decide in *Almeida-Sanchez* and on which the courts of appeals have reached inconsistent results—is whether the Border Patrol may, without a warrant, briefly stop a vehicle to question its occupants about their right to be in this country, when the officers know or reasonably believe that the occupants may be aliens.[3]

[3] In our petition for a writ of certiorari in *United States* v. *Peltier*, No. 73-2000, we argue that *Almeida-Sanchez* should not be applied retroactively to exclude evidence discovered as a result of a warrantless roving patrol stop and search conducted prior to this Court's decision. If the Court grants our petition and agrees with our contention in *Peltier*, that decision might provide a ground upon which the judgment in the present case could be reversed, since the stop of respondent's automobile occurred prior to the decision in *Almeida-Sanchez*. If the exclusionary rule is inapplicable in the case of a pre-*Almeida-Sanchez* stop and search, it is presumably inapplicable in the case of a pre-*Almeida-Sanchez* stop for interrogation without a search.

Because of the importance of prompt resolution of the question presented here to the administration of the Border Patrol's responsibilities, and in view of the existing conflict between the cir-

1. The decision in this case conflicts with that of the Court of Appeals for the Tenth Circuit in *United States* v. *Bowman, supra*. The court of appeals in the present case held that a warrantless immigration stop of a vehicle may be made only when the officers have a "founded suspicion" that the occupants of the vehicle are aliens whose presence in this country is unlawful. The Tenth Circuit, by contrast, held in *Bowman* that a stop of a vehicle "for the limited purpose of determining [the occupants'] citizenship" (487 F. 2d at 1231) is permissible without regard to whether the officers reasonably suspect that the occupants are present in this country unlawfully.

In *Bowman*, Border Patrol officers stopped the defendant in his car at a fixed checkpoint near Truth-or-Consequences, New Mexico, and, while questioning him about his citizenship, one of the officers detected the odor of marihuana. The officers then searched the car and discovered the marihuana in a footlocker and suitcase in the car's trunk. Ruling that the odor of marihuana gave the officers probable cause to search the car after it had been stopped, the court of appeals turned to the question of "the validity of the initial stopping" of the vehicle (*ibid.*). The court observed that 8 U.S.C. 1357(a)(1) authorizes Border Patrol officers "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States * * *." It held that *Almeida-Sanchez* limits only the Border Patrol's

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cuits on that question, we do not present in this petition the retroactivity question presented in *Peltier* and we do not here urge the nonretroactivity of *Almeida-Sanchez* as a ground for reversal.

authority to *search* a vehicle for concealed aliens under 8 U.S.C. 1357(a)(3) and does not affect its authority to *stop* a car under Section 1357(a)(1) "to make routine inquiries as to an individual's nationality" (*ibid.*).[4]

The stop in *Bowman* occurred at a fixed immigration checkpoint that was in operation, whereas the stop in the present case was effected by officers patrolling in the area of a fixed checkpoint that was not in operation. The court's reasoning in *Bowman,* however, was not limited to checkpoint stops, and the court's reasoning in this case was not limited to roving patrol stops. Indeed, the Ninth Circuit subsequently held, on the authority of its decision in this case, that checkpoint stops, like roving patrol stops, require "a reasonable belief, founded upon 'articulable' facts, that one or more of the people to be interrogated are aliens illegally in the country" (*United States* v. *Esquer-Rivera,* C.A. 9, Nos. 74—1110 and 74–1099, decided July 1, 1974, slip. op. 2).

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[4] Subsequently, in *United States* v. *Newman*, 490 F. 2d 993, the Tenth Circuit reversed a defendant's conviction because the marijuana discovered in his trunk was the product of an illegal search made without probable cause after he had been stopped at a turnpike gate near Miami, Oklahoma. The court pointed out, however (*id.* at 995):

"We do not question the right of a Border Patrol Agent to briefly detain an individual for the purpose of ascertaining his nationality. To this extent [the agent's] initial stopping of the appellants' vehicle in the case at bar was, in and of itself not illegal. * * *"

The upshot is that warrantless stops for interrogation are constitutionally permissible in the Tenth Circuit but constitutionally forbidden in the Ninth Circuit.[5]

2. The conflict should be resolved by this Court. The fair and effective enforcement of our Nation's immigration laws requires a definitive determination of the Border Patrol's authority to conduct routine interrogation stops of vehicles, particularly in the border areas, to determine the nationality and status of persons believed to be aliens. There are numerous cases pending in the lower federal courts that may turn on whether evidence derived from such stops may properly be introduced at trial. That determination should not, we submit, depend on the fortuity of the particular jurisdiction in which the stop occurred.

Moreover, it is important for the Border Patrol and the courts to know whether warrants are required for interrogation stops, and, if so, what standards should be applied by the courts in considering applications for such warrants. In the Ninth Circuit, for example, where the court of appeals has held that warrantless checkpoint searches and warrantless stops for interrogation violate the Fourth Amendment, the magistrates have refused to issue warrants for searches of automobiles at checkpoints and, in some cases, even for interrogation stops at some checkpoints. Since the

[5] The Fifth Circuit has not decided the issue. One panel, however, expressed "serious doubt" as to the validity of warrantless stops for interrogation in light of *Almeida-Sanchez*. *United States* v. *Rodriguez-Hernandez*, 493 F. 2d 168, 169, pending on petition for a writ of certiorari, No. 73-6851.

success of the Border Patrol's enforcement effort depends upon a coordinated program of stops and limited searches of vehicles at permanent and temporary checkpoints away from the border and by roving patrols, the inability to operate a particular checkpoint may substantially weaken the entire network by permitting illegal alien traffic to bypass other checking operations and to flow freely through the unpatrolled area. The existing uncertainty concerning the need for stop warrants and the showing necessary to secure them seriously threatens to undermine the Border Patrol's effectiveness.

3. On the merits, we submit that the decision in this case represents an incorrect application of the principles of *Almeida-Sanchez*. There is, in our view, a critical distinction of constitutional dimension between a search of an automobile for concealed aliens and a brief stop of an automobile to question its occupants about their right to be in this country. Even a limited search for aliens—involving an inspection of the car's passenger compartment, its trunk, and perhaps under the hood or behind the rear seat—is far more intrusive than a stop to ask a few questions.

Mr. Justice Powell's concurring opinion in *Almeida-Sanchez* recognized that the reasonableness of a search of an automobile for aliens does not necessarily depend upon the existence of probable cause to believe that a concealed illegal alien will be found in the automobile. Rather, as in *Camara* v. *Municipal Court,* 387 U.S. 523, a particular search may be reasonable if conducted as part of an area-wide program of searches that is itself reasonable, measured by the existence of a legitimate law enforcement need on the one hand and

the extent of the official intrusion on the other. Mr. Justice Powell thus concluded that "under appropriate limiting circumstances there may exist a constitutionally adequate equivalent of probable cause to conduct roving vehicular searches in border areas" (413 U.S. at 279).

In the context of a brief stop to make a limited inquiry about a person's nationality, there need not exist even an "equivalent of probable cause" (*ibid.*). We acknowledge that such a stop in the circumstances of this case is a sufficient interference with an individual's "personal security" to constitute a "seizure" under the Fourth Amendment (*Terry* v. *Ohio,* 392 U.S 1, 19 and n. 16). As this Court has held. however, "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest" (*id.* at 22).

Just as there can be a "constitutionally adequate equivalent of probable cause to conduct roving vehicular searches in border areas" (413 U.S. at 279), there can be circumstances that justify *stopping* an automobile to make a limited inquiry of its occupants even though the officers have no reason to believe that the occupants of the particular vehicle are aliens whose presence in this country is unlawful. Such circumstances exist in the area of the Mexican border, where there is a high incidence of illegal transportation of aliens who have entered this country unlawfully. Border Patrol officers may, we submit, make an

interrogation stop of a vehicle when they reasonably believe that its occupants are aliens, even if they have no reason to believe that the occupants are illegal aliens.

Although, on Mr. Justice Powell's reasoning in *Almeida-Sanchez,* a prior judicial determination is required to assure the reasonableness of the Border Patrol's plans for particular roving patrol search operations, no such prior judicial determination is required to assure the reasonableness of a limited interrogation stop such as the one conducted in the present case. The "intrusion upon constitutionally protected rights" (*Terry* v. *Ohio, supra,* 392 U.S. at 19, n. 16) is, by comparison to a search of an automobile, so reduced that there is little need for prior judicial supervision of the stopping procedure. In contrast to the situation as viewed by the majority in *Almeida-Sanchez,* there is here no claim of an "extravagant license to search" (413 U.S. at 268).

That is not to say that an aggrieved person may not allege and prove in a particular factual setting that the stop of his automobile was unreasonable or that the manner and scope of the officers' subsequent questioning were unlawful. We do say, however, that the Fourth Amendment values at stake are adequately protected when these claims are adjudicated *after* the stop and questioning have occurred and in the context of an adversary proceeding on specific facts.

We emphasize that a warrantless roving patrol stop for purposes of interrogation must be conducted in accordance with the Border Patrol's statutory authority. That is to say, the officers may stop a car only "to interrogate any alien or person believed to be an alien

as to his right to be or to remain in the United States" (8 U.S.C. 1357(a)(1)). Thus, while an officer need not, for the reasons we have discussed, have probable cause to believe that the automobile's occupants are aliens illegally present in this country—*i.e.*, that a crime is being committed—he must reasonably believe that they are aliens.

That requirement is satisfied, we submit, where, as here, officers patrolling in an area known to have a high incidence of illegal alien traffic, near a fixed checkpoint that has been closed because of inclement weather,[6] observe a northbound automobile containing three persons who appear to be of Mexican descent. In these circumstances, a brief stop of the car to inquire whether the occupants have a right to be in this country does not violate the Fourth Amendment and does not exceed the scope of the officers' authority under the statute.[7]

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[6] More than 12,000 deportable aliens were apprehended at the San Clemente checkpoint in fiscal year 1973 (*United States v. Baca*, *supra*, 368 F. Supp. at 410). "[I]t is an unusual 8 hour shift that does not result in at least 20 or 30 apprehensions" (*ibid.*).

[7] Moreover, Section 1357(a)(3)—which authorizes officers within a reasonable distance of the border to search vehicles for aliens—may comprehend independent authority to stop a vehicle without searching it, not principally to investigate the nationality of the visible occupants, but to ask questions designed to ascertain whether the vehicle contains any *concealed* aliens. On that reasoning, it may be that a vehicle could be stopped even without a belief that its visible occupants are aliens.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
MARK L. EVANS,
Assistant to the Solicitor General.
SHIRLEY BACCUS-LOBEL,
REUBEN H. WALLACE, JR.,
Attorneys.

AUGUST 1974.

APPENDIX A

United States Court of Appeals for the Ninth Circuit

No. 73-2161

UNITED STATES OF AMERICA, APPELLEE

v.

FELIX HUMBERTO BRIGNONI-PONCE, APPELLANT

OPINION

[Decided June 14, 1974]

Appeal from the United States District Court for the Southern District of California

Before CHAMBERS, MERRILL, KOELSCH, BROWNING, DUNIWAY, ELY, HUFSTEDLER, WRIGHT, TRASK, CHOY, GOODWIN, WALLACE, and SNEED, *Circuit Judges.*

GOODWIN, *Circuit Judge:* Felix Humberto Brignoni-Ponce appeals his conviction for transporting aliens in violation of 8 U.S.C. § 1324(a)(2). Two illegal aliens were discovered following a warrantless stop of his car near the San Clemente immigration checkpoint. The government contends that even if recent decisions by the Supreme Court and this court have stripped the Border Patrol of its authority to stop vehicles and search them for aliens, the Border Patrol still retains the authority, exercised in this case, to stop and interrogate any person believed to be an alien as to his right to remain in the United States. We reject that contention and reverse the conviction.

On March 11, 1973, the San Clemente immigration checkpoint, located in San Onofre, California, approximately 65 miles north of the Mexican border on Interstate 5 between San Diego and Los Angeles, was

closed because of inclement weather. During the early morning hours, an agent of the Border Patrol was observing northbound traffic from his patrol car, parked at a ninety-degree angle to the interstate highway. Observing a passing vehicle whose occupants appeared to be of Mexican descent, the agent pursued the car and stopped it. Investigation soon revealed that the two passengers were illegally in the United States. They and the driver, Brignoni-Ponce, were then arrested.

In *United States v. Peltier,* F. 2d (9th Cir., May 9, 1974) (en banc), this court held that the rule announced by the Supreme Court in *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973), applied retroactively to all cases involving roving-patrol searches which were pending on appeal at the time that *Almeida-Sanchez* was announced. However, in *United States v. Bowen,* F. 2d (9th Cir., May 9, 1974) (en banc), we also held that, although searches by border-patrol agents at fixed checkpoints violated the Fourth Amendment, *Almeida-Sanchez* would not be applied retroactively to fixed-checkpoint searches conducted prior to the date of decision of *Almeida-Sanchez.*

The stop of Brignoni-Ponce's car was made before the decision in *Almeida-Sanchez* was announced. The first question, then, is whether or not the stop was more like one by a roving patrol than one at a fixed checkpoint. Although we held in *United States v. Morgan,* F. 2d (9th Cir., June 14, 1974) en banc), that searches at the San Clemente checkpoint were fixed-checkpoint searches rather than roving-patrol searches. Brignoni-Ponce's car was not stopped at the checkpoint. Rather, because the checkpoint was closed and no marked barricades designed to impede vehicular traffic were in place, Brignoni-Ponce would

have proceeded undisturbed except for the decision to pursue him. His car was overtaken and stopped north of the closed checkpoint. Although the line between a roving-patrol stop and a fixed-checkpoint stop is not a clear one, we hold that pursuing a passing car and flagging it to the side of the road is conduct more characteristic of a roving-patrol stop than of a fixed-checkpoint stop. *See United States v. Grijalva-Carrera,* F. 2d (9th Cir., June 14, 1974) (en banc); *United States v. Bowen,* F. 2d at (slip opinion at 4–5).

The government contends, however, that even if this court holds that the stop was a roving-patrol stop, that holding would not dispose of this case. It argues that *Almeida-Sanchez, Peltier, Bowen, Morgan,* and *Grijalva-Carrera* all involved the constitutionality of searches without probable cause, pursuant to 8 U.S.C. § 1357(a)(3). This case, by contrast, involves merely a stop, pursuant to 8 U.S.C. § 1357(a)(1), for the purpose of interrogating a person believed to be an alien regarding his right to remain in the United States. In support of its argument, the government cites the recent decision by the Court of Appeals for the Tenth Circuit in *United States v. Bowman,* 487 F. 2d 1229 (10th Cir. 1973), holding that *Almeida-Sanchez* applied only to searches under § 1357(a)(3) and not to stops for interrogation under § 1357(a)(1).

We cannot adopt the approach taken by our brothers on the Tenth Circuit. Section 1357(a)(1), unlike § 1357(a)(3), has no requirement that the stop be within a "reasonable distance" from the border. Under the Tenth Circuit's view, immigration officials could stop a vehicle anywhere in the country in order to interrogate its occupants as to their right to be in the United States, without a warrant, without probable

cause, and without even a reasonable suspicion that any of the occupants are illegal aliens.

Such stops are entirely inconsistent with the Supreme Court's opinion in *Almeida-Sanchez*. Although the facts of *Almeida-Sanchez* called into question only that portion of § 1357(a) involving the Border Patrol's authority to stop and search vehicles, the Court's opinion reflects at least as much concern with the initial stop as with the subsequent search. *See, e.g.*, 413 U.S. at 268:

> "* * * It is undenied that the Border Patrol had no search warrant, and that there was no probable cause of any kind for the *stop* or the subsequent search * * *." (Emphasis added.)

And 413 U.S. at 272:

> "* * * [N]either this Court's automobile search decisions nor its administrative inspection decisions provide any support for the constitutionality of the *stop* and search in the present case * * *." (Emphasis added.)

The Court ended its opinion, 413 U.S. at 274–75, by quoting from *Carroll v. United States*, 267 U.S. 132 (1925), as follows:

> "* * * It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official

> authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise * * *." 267 U.S. at 153–54.

Had the Court intended to leave intact the government's asserted right to stop cars on mere suspicion anywhere in the country in order to interrogate their occupants as to their right to remain in the United States, we doubt that it would have quoted this language fom *Carroll.* Even more than immigration searches which had to be conducted within an area no more than 100 miles from the border, these immigration stops offend the "right to free passage without interruption" of "those lawfully within the country."

Moreover, the Tenth Circuit's position is inconsistent with settled law of this circuit. In *United States v. Mallides,* 473 F. 2d 859, 861 (9th Cir. 1973), we held that the stop of a vehicle by police officers, even for the limited purpose of questioning its occupants, must be based upon a "founded suspicion." *See also United States v. Ward,* 488 F. 2d 162, 168–69 (9th Cir. 1973) (en banc). This holding was subsequently applied to investigatory stops by border-patrol agents. *See, e.g., United States v. Mora-Chavez,* — F. 2d — (9th Cir., Apr. 26, 1974); *United States v. Bugarin-Casas,* 484 F. 2d 853, 854 (9th Cir. 1973), *cert. denied,* — U.S. — (1974).

Likewise, the Court of Appeals for the District of Columbia Circuit has held that immigration officials, in accordance with § 1357(a)(1), may make forcible detentions of a temporary nature for the purposes of interrogation under circumstances creating a reasonable suspicion, not arising to the level of probable cause to arrest, that the individual so detained is illegally in this country. *Au Yi Lau et al. v. United States Immigration & Naturalization Service,* 445 F. 2d 217,

223 (D.C. Cir.) (later vacated as to one party only), *cert. denied,* 404 U.S. 864 (1971).

Here, the border-patrol agents who stopped Brignoni-Ponce's car did not possess facts which constituted a founded suspicion that he or his passengers were illegal aliens. All that they knew was that Brignoni-Ponce and his companions appeared to be of Mexican descent and were in a sedan traveling north on Interstate 5, approximately 65 miles north of the Mexican border. This is not enough. As we said in *United States v. Mallides:*

> "* * * [T]here is nothing suspicious about six persons riding in a sedan. The conduct does not become suspicious simply because the skins of the occupants are nonwhite * * *." 473 F. 2d at 861.

We hold, then, that the stop and interrogation of Brignoni-Ponce and the passengers in his car were illegal, and the fruits of the illegal conduct were inadmissible. *See United States v. Guana-Sanchez,* 484 F. 2d 590 (7th Cir. 1973), *petition for cert. filed* November 23, 1973 (U.S. No. 73–820).

Reversed and remanded.

APPENDIX B

United States Court of Appeals For the Ninth Circuit

No. 73-2161, DC No. 14805

UNITED STATES OF AMERICA, APPELLEE

v.

FELIX HUMBERTO BRIGNONI-PONCE, APPELLANT

JUDGMENT

Appeal from the United States District Court for the Southern District of California.

This Cause came on to be heard on the Transcipt of the Record from the United States District Court for the Southern District of California and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is

Reversed and Remanded.

A true copy
Attest June 20, 1974.

EMIL E. MELFI, JR.,
Chief Deputy and Acting Clerk.
RAY HEWITT,
Senior Deputy.

Filed and entered June 14, 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974

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Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-114

UNITED STATES OF AMERICA, PETITIONER

v.

FELIX HUMBERTO BRIGNONI-PONCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 13-17) is reported at 499 F. 2d 1109.

JURISDICTION

The *en banc* judgment of the court of appeals (A. 18) was entered on June 14, 1974. On July 10, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including August 13, 1974. The petition was filed on that date and was granted on October 15, 1974 (A. 19). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the warrantless stop of an automobile by Border Patrol officers, in order to question persons in the vehicle concerning their right to be or remain in the United States, violates the Fourth Amendment's proscription against unreasonable searches and seizures and requires the suppression of evidence obtained solely as a result of the stop and questioning and not as a result of any subsequent search.

STATUTE AND REGULATION INVOLVED

1. Section 287(a) of the Immigration and Nationality Act, 66 Stat. 233, 8 U.S.C. 1357(a), provides in pertinent part:

> Any officer or employee of the [Immigration and Naturalization] Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
>
> * * * * *
>
> (3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; * * *

2. 8 C.F.R. 287.1 provides in pertinent part:

> (a)(2) *Reasonable distance.* The term "reasonable distance," as used in section 287(a)(3) of the Act, means within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the district director, or, so far as the power to board and search aircraft is concerned, any distance fixed pursuant to paragraph (b) of this section.
>
> (b) *Reasonable distance; fixing by district directors.* In fixing distances not exceeding 100 air miles pursuant to paragraph (a) of this section, district directors shall take into consideration topography, confluence of arteries of transportation leading from external boundaries, density of population, possible inconvenience to the traveling public, types of conveyances used, and reliable information as to movements of persons effecting illegal entry into the United States: *Provided,* That whenever in the opinion of a district director a distance in his district of more than 100 air miles from any external boundary of the United States would because of unusual circumstances be reasonable, such district director shall forward a complete report with respect to the matter to the Commissioner, who may, if he determines that such action is justified, declare such distance to be reasonable.

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, respondent was convicted on two counts of violating 8 U.S.C. 1324(a)(2), transporting aliens who were

present in this country illegally. He was sentenced to four years' imprisonment on count 1, subject to the immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2), and five years' probation on count 2, to be commenced upon release from confinement or parole (A. 11–12).

1. The evidence at trial established that on March 11, 1973, Border Patrol Agents Brady and Harkins were on duty in a patrol car observing northbound traffic on Interstate Highway 5 approximately four miles south of San Clemente, California (A. 5–6). The officers were parked off the highway at the site of a permanent immigration checkpoint that was closed because of inclement weather and a shortage of manpower (A. 6). The patrol car was parked at a 90-degree angle to the highway with its headlights on, enabling the officers to see the occupants of passing vehicles (A. 6, 9).[1] During the early evening hours, they observed, traveling north, a vehicle driven by respondent and containing two passengers. The officers pursued and stopped the car for a "routine immigration inspection," because they observed that its three occupants appeared to be of Mexican descent (A. 6–9).

Upon questioning the passengers in the vehicle in English and Spanish concerning their citizenship, the

[1] The San Clemente checkpoint, at which the officers were parked, is approximately 62 air miles and 66 road miles north of the Mexican border. *United States* v. *Baca*, 368 F. Supp. 398, 410 (S.D. Cal.). The validity of a warrantless *search* of a vehicle for aliens at that checkpoint, conducted as part of the checkpoint's normal operation, is before this Court in *United States* v. *Ortiz*, No. 73–2050.

officers discovered that they spoke no English and had no papers authorizing them to be in the United States (A. 7). Respondent and the passengers were then arrested (A. 8). At trial, both passengers testified that they were Mexican citizens who had entered the United States illegally (Tr. 24–25, 57, 63–64).

The parties agreed by stipulation that respondent's motion to suppress the evidence derived from the stop of his vehicle could be heard at the time of trial (A. 10). The district court formally denied the motion three months after the trial had ended (*ibid.*).

2. Subsequent to respondent's trial, this Court decided *Almeida-Sanchez* v. *United States,* 413 U.S. 266, which held that a warrantless roving patrol *search* of an automobile for concealed aliens, conducted by Border Patrol officers acting without probable cause or reasonable suspicion to believe that the vehicle contained aliens present in this country unlawfully, violated the Fourth Amendment's proscription against unreasonable searches and seizures. The Ninth Circuit thereafter held that the ruling in *Almeida-Sanchez* should be applied retroactively to require the exclusion of evidence seized in similar roving patrol searches conducted prior to the date of this Court's decision in *Almeida-Sanchez* (*United States* v. *Peltier,* 500 F. 2d 985, certiorari granted, November 11, 1974, No. 73–2000). The Ninth Circuit also held, however, that *Almeida-Sanchez* should apply only prospectively with respect to searches conducted at fixed immigration checkpoints (*United States* v. *Bowen,* 500 F. 2d

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960, certiorari granted, October 15, 1974, No. 73-6848).[2]

In the present case, the court of appeals, sitting *en banc*, reversed respondent's conviction (A. 13-17). It held first that the Border Patrol officers' conduct in pursuing respondent's vehicle and flagging it to the side of the road was "more characteristic of a roving-patrol stop than of a fixed-checkpoint stop" (A. 14). The court therefore determined, pursuant to its prior decision in *Peltier*, that the principles of *Almeida-Sanchez* were applicable even though the stop occurred prior to this Court's decision in that case (*ibid.*).

The court next held that warrantless *stops* of vehicles, "without probable cause, and without even a reasonable suspicion that any of the occupants are illegal aliens [,] * * * are entirely inconsistent with the Supreme Court's opinion in *Almeida-Sanchez*" (A. 15). The court of appeals acknowledged that *Almeida-Sanchez* involved a search rather than only a stop and that 8 U.S.C. 1357(a) gives Border Patrol officers authority not only to search vehicles for concealed aliens without a warrant but also "to interrogate any alien or person believed to be an alien as to his right to be or remain in the United States * * *."

[2] The Ninth Circuit had first held in *Bowen* that *Almeida-Sanchez* should be extended to invalidate warrantless searches of automobiles for aliens at fixed checkpoints. We argue in *Bowen* and in *United States* v. *Ortiz*, No. 73-2050, that warrants should not be required for checkpoint searches of vehicles for concealed aliens and that, even if warrants are required, the ruling should not apply in the Ninth Circuit to checkpoint searches that occurred prior to that court's decision in *Bowen*.

soned, however, that this Court's opinion
The court rea*nchez* "reflects at least as much concern
in *Almeida-Sa*l stop as with the subsequent search"
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(A. 15). concluded that a warrantless stop of a
The court nissible only if the officers have informa-
vehicle is per tes "a founded suspicion" that one or
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court held th founded suspicion that [respondent] or
constituted a s were *illegal* aliens" (*ibid.;* emphasis
his passenger ourt therefore concluded that "the stop
added). The c tion * * * were illegal, and the fruits of
and interroga nduct were inadmissible" (*ibid.*).
the illegal co
The court r efused to "adopt the approach taken by
our brothers on the Tenth Circuit" (A. 15) in *United States* v. *Bowman,* 487 F. 2d 1229, in which that court held that the stopping of an automobile "for the limited purpose of determining [the driver's] citizenship was entirely justified" under 8 U.S.C. 1357(a)(1) and is not barred by the Fourth Amendment or by the principles of *Almeida-Sanchez* (487 F. 2d at 1231).

ARGUMENT

BORDER PATROL OFFICERS MAY, WITHOUT A WARRANT, LAWFULLY STOP A VEHICLE IN THE AREA OF THE MEXICAN BORDER TO QUESTION THE OCCUPANTS CONCERNING THEIR RIGHT TO BE OR REMAIN IN THE UNITED STATES

A. INTRODUCTION AND SUMMARY

This case is similar to *Almeida-Sanchez* insofar as both involve roving patrol operations[3] in the Mexican border area, conducted as part of the Border Patrol's overall program to enforce the Nation's immigration laws. The present case differs from *Almeida-Sanchez*, however, in one important respect. Whereas the marihuana that formed the basis of the prosecution in *Almeida-Sanchez* was discovered under the back seat of the defendant's automobile in the course of a search for concealed aliens, the evidence that was held inadmissible by the court of appeals in the present case was derived solely from "the stop and interrogation of Brignoni-Ponce and the passengers in his car" (A. 17). There is no contention that any evidence introduced at respondent's trial was the fruit of an unlawful search of his automobile.

The only question presented here, therefore, is whether the warrantless roving patrol stop of respondent's vehicle by Border Patrol officers, in order

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[3] The court of appeals in the present case, recognizing that "the line between a roving-patrol stop and fixed-checkpoint stop is not a clear one," concluded that "pursuing a passing car and flagging it to the side of the road is conduct more characteristic of a roving-patrol stop than of a fixed-checkpoint stop" (A. 14). Though we think the question is a close one, we do not here dispute the court's conclusion.

to question the vehicle's occupants concerning their right to be or remain in the United States, violated the Fourth Amendment and requires suppression of the evidence derived therefrom.[4]

Two inquiries are necessary to determine the lawfulness of the stop. First, what is the nature and quantum of cause necessary, in the area of the Mexican border, to justify a stop of a car and an inquiry into the citizenship status of its occupants? Second, may such a stop properly be made without advance judicial approval through the warrant procedure?

Looking first to the question of cause, we argue in this brief that the stop of respondent's automobile was properly predicated upon an area-wide equivalent of probable cause that would have justified not merely a brief stop for interrogation but even a limited search of the vehicle for aliens. Because of the unique conditions and difficult law enforcement problems in the Mexican border areas, it may be reasonable to

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[4] The stop of respondent's vehicle occurred prior to this Court's decision in *Almeida-Sanchez*. In *United States* v. *Peltier*, No. 73-2000, we argue that *Almeida-Sanchez* should not be applied retroactively to exclude evidence discovered as a result of a warrantless roving patrol stop and search conducted prior to *Almeida-Sanchez*. If the Court agrees with our contention in *Peltier*, we assume that the exclusionary rule would also be inapplicable to a pre-*Almeida-Sanchez* stop for interrogation *without* a search. We do not urge the nonretroactivity of *Almeida-Sanchez* as a ground for reversal here, however, because respondent's case was the vehicle for an extension of *Almeida-Sanchez* by the Ninth Circuit. If this Court holds that warrantless stops are unlawful, then we would agree, in line with our position in *United States* v. *Ortiz*, No. 73-2050, and *Bowen* v. *United States*, No. 73-6848, that respondent should be given the benefit of that new rule.

stop a vehicle to ask the occupants about their right to be or remain in this country even though the officers lack an articulable suspicion that the particular vehicle to be stopped contains illegal aliens.

Turning to the warrant issue, we then argue that advance judicial approval of such a stop through the warrant procedure is not necessary to ensure the reasonableness of so brief and limited an interference with the privacy interests of the traveling public. Although Mr. Justice Powell concluded in *Almeida-Sanchez* that an area warrant was required to justify a roving patrol *search* of a vehicle for aliens, a brief stop for questioning, which ordinarily takes less than a minute and requires no more of the occupants than a response to one or two questions and possibly the production of an immigration document, is a far less drastic intrusion than a search of the vehicle for aliens. In view of the important governmental interest in making such stops, the difficulty of adapting most roving patrol operations to an area warrant procedure, and the limited scope of the resulting interference with highway travel, a routine investigative stop in the border area, made by Border Patrol officers pursuant to express statutory authority, is not an unreasonable seizure under the Fourth Amendment even though conducted without an area warrant.

B. THERE EXISTS AN AREA-WIDE EQUIVALENT OF PROBABLE CAUSE THAT JUSTIFIES A BRIEF STOP OF A VEHICLE IN THE MEXICAN BORDER AREA TO INQUIRE ABOUT THE CITIZENSHIP OF ITS OCCUPANTS

1. The decision of the court of appeals rests upon a fundamental misconception concerning the nature of

the cause necessary to justify a stop of a vehicle in the border areas. The court held that the investigating officers must "possess facts" amounting to "a founded suspicion" that the particular vehicle to be stopped contains aliens illegally present in this country (A. 17).

It is true that in the usual case the permissible reason for a search or seizure must be focused with particularity upon the person or object to be searched or seized. But this Court has recognized that the probable cause requirement may be satisfied in some circumstances by knowledge of conditions in an "area as a whole" rather than by "specific knowledge" with respect to the particular object of a search (*Camara* v. *Municipal Court,* 387 U.S. 523, 536, 538).

Camara involved a city-wide program of routine and periodic building inspections to identify housing code violations. This Court ruled that the constitutionality of any particular inspection turned not upon the existence of probable cause to believe that a violation would be uncovered in the particular building to be inspected, but upon the reasonableness of the inspection program itself. "[T]he agency's decision to conduct an area inspection is unavoidably based on its appraisal of conditions in the area as a whole, not on its knowledge of conditions in each particular building" (387 U.S. at 536). The Court held that, if entry to a particular building were refused, a warrant could be issued on the basis of this area-wide probable cause, "if reasonable legislative or administrative standards for conducting an area inspection are satis-

fied with respect to a particular dwelling" (*id.* at 538). See also *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72; *United States* v. *Biswell,* 406 U.S. 311.

We argued in *Almeida-Sanchez* that the Border Patrol's traffic checking procedures in the area of the Mexican border were essential to the effective enforcement of this country's immigration laws and that roving patrol searches could be justified on the basis of an area-wide probable cause like that in *Camara.* Though the Court held that such searches could not, in any event, be deemed reasonable in the absence of a warrant, the majority opinion did not reject the applicability of area-wide probable cause in this context, and both Mr. Justice Powell's concurring opinion and Mr. Justice White's dissenting opinion (joined by the Chief Justice and Justices Blackmun and Rehnquist) agreed that the probable cause principles of *Camara* may be applicable to the Border Patrol's roving patrol search operations.

Mr. Justice Powell stated that "under appropriate limiting circumstances there may exist a constitutionally adequate equivalent of probable cause to conduct roving vehicular searches in border areas" (413 U.S. at 279). Because many illegal entrants "cross the border on foot, or at places other than established [border] checkpoints, it is simply not possible in most cases for the Government to obtain specific knowledge that a person riding or stowed in an automobile is an alien illegally in the country" (*id.* at 276–277). "[O]n appropriate facts," however, "the Government can

satisfy the probable cause requirement for a roving search in a border area without possessing information about particular automobiles" (*id.* at 281).[5]

As we show in our brief in *United States* v. *Ortiz*, No. 73–2050, pp. 20–32, the factors that persuaded Mr. Justice Powell that roving patrol searches could be justified in the border areas on the basis of this area-wide "functional equivalent of probable cause" (413 U.S. at 277) are at least as strong today as they were at the time of the decision in *Almeida-Sanchez*. There is no need to repeat here what we said in our brief in *Almeida-Sanchez* and what we reiterated in our brief in *Ortiz*. It is enough to say that the high concentration of illegal aliens in the Mexican border area, the absence of any reasonable law enforcement alternative to conducting roving patrol searches, and the consistent judicial approval of such searches prior to *Almeida-Sanchez* combine to justify, on an area-wide basis, the modest intrusion caused by a limited roving patrol search of a vehicle for aliens. Though a warrant is required for such a search under *Almeida-Sanchez*, it may be issued without a showing that there

[5] Mr. Justice Powell concluded, however, that a warrant should be required for such searches. The dissenting Justices, though disputing the need for a warrant, agreed that area-wide probable cause would satisfy the Fourth Amendment's requirements for issuance of warrants. Mr. Justice White stated: "[A]t least one Justice, Mr. Justice Powell, would uphold searches by roving patrols if authorized by an area warrant issued on less than probable cause in the traditional sense. I agree with Mr. Justice Powell that such a warrant so issued would satisfy the Fourth Amendment, and I expect such warrants would be readily issued" (413 U.S. at 288).

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is reason to believe that any particular vehicle is carrying a concealed alien.

The present case involves only a brief stop of a vehicle to question its occupants concerning their right to be or remain in the United States, and this Court has held that an investigative stop by a law enforcement officer may be justified on less than probable cause. "[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry* v. *Ohio,* 392 U.S. 1, 22; see also *Adams* v. *Williams,* 407 U.S. 143.

When *Terry* is read together with *Camara* and the concurring and dissenting opinions in *Almeida-Sanchez,* this is what emerges. An investigative stop of an automobile to inquire into the citizenship status of its occupants may be made on the basis of reasonable suspicion not amounting to probable cause, but that suspicion, like the probable cause in *Camara,* need not be focused with particularity on the specific vehicle to be stopped. It may be based, instead, upon knowledge of conditions in the area as a whole. The conditions in border areas are such that investigative roving patrol stops, like the more intrusive roving patrol searches, are essential to the effective enforcement of the immigration laws.[6] Since those conditions may

[6] "[I]f immigration authorities were unable to question aliens as to their right to be in this country without some independent evidence that they were here illegally, their job would be impossible." *United States* v. *Montez-Hernandez,* 291 F. Supp. 712, 715 (E.D. Cal.).

provide "a constitutionally adequate equivalent of probable cause" (413 U.S. at 279) to conduct a roving patrol search, it follows *a fortiori* that the same conditions may constitute sufficient cause to conduct a far less intrusive stop for questioning.

We submit, therefore, that the court of appeals erred in holding that the Fourth Amendment could be satisfied only upon the basis of particularized suspicion with respect to each vehicle stopped. Putting aside for a moment the question whether a warrant is required, it is our submission that the same area-wide equivalent of probable cause that at least five Justices thought could justify a roving patrol search in *Almeida-Sanchez* also may justify the lesser intrusion involved in a brief investigative stop.

Prior to this Court's decision in *Almeida-Sanchez*, the courts of appeals had uniformly upheld investigative stops of vehicles in the Mexican border areas without requiring particularized suspicion. *E.g.*, *Ramirez* v. *United States*, 263 F. 2d 385 (C.A. 5); *Contreras* v. *United States*, 291 F. 2d 63 (C.A. 9); *Fernandez* v. *United States*, 321 F. 2d 283 (C.A. 9); *United States* v. *Campos*, 471 F. 2d 296 (C.A. 9); *United States* v. *Saldana*, 453 F. 2d 352 (C.A. 10); *Roa-Rodriquez* v. *United States*, 410 F. 2d 1206 (C.A. 10).[7] Even after *Almeida-Sanchez*, the Tenth Circuit

[7] In many cases in which the courts considered the legality of a search of a vehicle, the lawfulness of the initial stop was unquestioned. See, *e.g.*, *United States* v. *Wright*, 476 F. 2d 1027 (C.A. 5), certiorari denied, 414 U.S. 821; *United States* v. *McDaniel*, 463 F. 2d 129 (C.A. 5), certiorari denied, 413 U.S. 919; *United States* v. *Marin*, 444 F. 2d 86 (C.A. 9); *Fumagalli* v. *United States*, 429 F. 2d 1011 (C.A. 9); *United States* v.

adhered to its view that the Fourth Amendment is not violated when Border Patrol officers, without a warrant, stop a vehicle "to make routine inquiries as to an individual's nationality" (*United States* v. *Bowman*, *supra*, 487 F. 2d at 1231).[8]

2. A word should be said, however, about the relationship between what the Fourth Amendment may tolerate on the one hand and what the Immigration and Nationality Act may authorize on the other hand.

Avey, 428 F. 2d 1159 (C.A. 9), certiorari denied, 400 U.S. 903; *United States* v. *Miranda*, 426 F. 2d 283 (C.A. 9); *United States* v. *McCormick*, 468 F. 2d 68 (C.A. 10), certiorari denied, 410 U.S. 927.

Outside the border areas, and in the context of personal encounters rather than highway stops, some courts have applied different rules. In the District of Columbia Circuit, for example, "forcible detentions of a temporary nature for purposes of interrogation" were permitted "under circumstances creating a reasonable suspicion, not arising to the level of probable cause to arrest, that the individual so detained is *illegally* in the country." *Au Yi Lau* v. *Immigration and Naturalization Service*, 445 F. 2d 217, 223 (emphasis added); see also *Yam Sang Kwai* v. *Immigration and Naturalization Service*, 411 F. 2d 683 (C.A. D.C.); *Cheung Tin Wong* v. *Immigration and Naturalization Service*, 468 F. 2d 1123 (C.A. D.C.); *United States* v. *Cho Po Sun*, 409 F. 2d 489 (C.A. 2), certiorari denied, 396 U.S. 864. Though we do not necessarily agree that the D.C. Circuit's standard is correct, we note that the conditions that give rise to area-wide probable cause in the border areas may not be present in other locations.

[8] See also *United States* v. *Newman*, 490 F. 2d 993, 995 (C.A. 10). The Fifth Circuit has not had occasion to decide the question since the decision in *Almeida-Sanchez*. One panel, however, expressed "serious doubt" as to the continued validity of warrantless stops for interrogation. *United States* v. *Rodriguez-Hernandez*, 493 F. 2d 168, 169, pending on petition for a writ of certiorari, No. 73-6851.

Section 287(a) of the Act, 8 U.S.C. 1357(a), gives Border Patrol officers the "power without warrant—(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States [and] * * * (3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any * * * vehicle * * *." The term "reasonable distance" as used in subsection (3) is defined by 8 C.F.R. 287.1(a)(2) as "within 100 air miles from any external boundary of the United States * * *."

The search authority conferred by subsection (3) is not conditioned upon the existence of any particularized knowledge. The Border Patrol is authorized to search "*any* vehicle" (emphasis added). That authority may be exercised, however, only within a reasonable distance from an external boundary, and the scope of the search power is limited to places in a vehicle where a human being could reasonably be concealed.[9] Obviously, the power conferred by subsection (3) to conduct a limited search of any vehicle in the border area necessarily comprehends the power to *stop* any vehicle in that area and to ask questions of its occupants to determine whether the vehicle contains concealed aliens.

The interrogation authority conferred by subsection (1), unlike the search authority conferred by subsection (3), is not limited to a reasonable distance

[9] As we indicated in our brief in *Ortiz* (p. 29), an automobile inspection is usually limited to a brief look in the trunk but occasionally extends to a look under the hood, beneath the chassis, or behind the back seat.

from an external boundary. Its exercise, however, is conditioned upon the existence of some particularized knowledge concerning the person to be questioned. He must be an "alien or person believed to be an alien * * *." Moreover, the questioning under subsection (1) may extend only to the person's "right to be or to remain in the United States."

Thus, when the two subsections are read together, they authorize the Border Patrol to conduct the following investigative activity without a warrant. Within a reasonable distance from an external boundary, officers may stop *any* vehicle, may question its occupants concerning both their right to be in the United States and the possibility that aliens may be concealed in the vehicle, and may search the vehicle for aliens. Outside a reasonable distance from an external boundary, Border Patrol officers may stop only those vehicles containing persons whom the officers believe to be aliens, may question those persons only as to their right to be or to remain in the United States, and may search a vehicle only upon particularized probable cause.

The statute represents the considered judgment of Congress that the measures it authorizes are essential to the effective enforcement of the immigration laws and consistent with the reasonableness standard of the Fourth Amendment. *Almeida-Sanchez* v. *United States, supra,* 413 U.S. at 291, 293 (Mr. Justice White dissenting). That judgment is entitled to considerable respect. See *United States* v. *Biswell, supra,* 406 U.S. at 315–317; *Colonnade Catering Corp.* v. *United States, supra,* 397 U.S. at 76. Insofar as the

judgment is incorrect, however, the authority conferred by the statute is ultimately circumscribed by the Fourth Amendment, for "[i]t is clear * * * that no Act of Congress can authorize a violation of the Constitution" (*Almeida-Sanchez* v. *United States*, *supra*, 413 U.S. at 272).

Thus, in *Almeida-Sanchez* this Court held that a roving patrol search conducted without a warrant pursuant to the authority conferred by subsection (3) nevertheless violated the Fourth Amendment. And we acknowledged in *Almeida-Sanchez* that routine searches of vehicles for aliens in Times Square would be "unreasonable" in the constitutional sense, even though it is technically within a "reasonable distance" of an external boundary as that term is defined by the regulation. The conditions in New York City would not provide an area-wide equivalent of probable cause sufficient to justify the practice of conducting such searches.[10]

But even if a statute authorizes law enforcement conduct that might in some circumstances be regarded as unreasonable under the Fourth Amendment, that does not mean that the authorized conduct must be viewed as unreasonable in *all* circumstances. It may be, for example, that a Border Patrol law enforce-

[10] The Immigration and Naturalization Service, of course, has never claimed or exercised any authority to conduct such searches in New York or similar places. The Border Patrol has conducted routine searches of vehicles for aliens only in the area of this country's border with Mexico, where illegal entry is a serious problem and where the concentration of illegal entrants is high, and occasionally in the area of the Canadian border when seasonal and other circumstances lead to increased border-crossing violations.

ment method apparently authorized by statute would be unreasonable if used in Times Square but quite reasonable if used near El Paso, Texas, a mile or two from the Mexican border. The official conduct should not be regarded as unconstitutional when it occurs in El Paso simply because it might be unconstitutional if it occurred in New York.

The Border Patrol officers in the present case were observing traffic in a patrol car at the closed San Clemente checkpoint, located in an area known to have a high incidence of illegal alien traffic. The checkpoint "straddles a natural corridor along which illegal aliens frequently travel in their migration towards the labor markets in the north," and it has been described as "the primary, or cornerstone, checkpoint maintained by the Border Patrol" in southern California (*United States* v. *Baca*, 368 F. Supp. 398, 410, 415 (S.D. Cal.)). More than 12,000 deportable aliens were apprehended at the checkpoint in fiscal year 1973, and in normal operation it is common for an eight-hour shift to result in as many as 20 or 30 apprehensions (*id.* at 410).

Against this background, it is not difficult to understand why Border Patrol Agents Brady and Harkins acted as they did when they observed respondent's northbound vehicle pass the checkpoint containing three persons who appeared to be of Mexican descent. Though the officers had no particularized suspicion that those individuals were illegally present in the country, the circumstances made it appropriate to stop the vehicle briefly to inquire whether they were citizens of the United States or had a right to be here. We

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there was sufficient area-wide cause to
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matter whether sufficient cause would exist to make a similar stop elsewhere.[11]

C. ADVANCE JUDICIAL APPROVAL THROUGH THE WARRANT PROCEDURE IS NOT NECESSARY TO ENSURE THE REASONABLENESS OF A BRIEF INVESTIGATIVE STOP OF A VEHICLE

If, as we have shown, the Border Patrol officers had sufficient cause to stop respondent's vehicle in order to inquire about the citizenship status of its occupants, there remains the question—which the court of appeals did not address—whether advance judicial approval in the form of an area warrant, required by this Court for a roving patrol *search* in *Almeida-Sanchez*, should also be required for the kind of brief roving patrol stop and questioning that took place in this case.[12]

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[11] Similarly, although we believe that Border Patrol officers may, under 8 U.S.C. 1357(a)(3), lawfully make routine vehicle stops *in the border areas* even when they do not have reason to believe that the occupants of the vehicle may be aliens, that issue need not be decided in this case. Border Patrol Agent Brady testified that respondent's vehicle was stopped because the people in the car appeared to be of Mexican descent (A. 9). All that must be decided here, therefore, is whether the authority conferred by subsection (1) to interrogate persons believed to be aliens may be exercised by stopping vehicles containing such persons for brief questioning within the Mexican border areas.

[12] The Ninth Circuit has held that the particularized suspicion requirement for roving patrol stops that was announced in this case extends also to stops at fixed checkpoints in the course of their normal operation. *United States* v. *Esquer-Rivera*, Nos. 74–1110, *et al.*, decided July 1, 1974. If this Court agrees with our contention in *Ortiz* that searches of vehicles for aliens may be conducted at fixed checkpoints routinely and without a warrant, it would follow that stops for questioning at such check-

Our contention can be stated quite simply. The "seizure" involved in this case was so limited an intrusion into the privacy interests protected by the Fourth Amendment that the interposition of a magistrate was unnecessary to ensure its reasonableness.[13] Just as the nature of the cause necessary to justify a particular search or seizure depends in part upon the extent of the intrusion contemplated (*Terry* v. *Ohio,* 392 U.S. 1, 17–18, n. 15), so should the need for a warrant turn in part upon the scope of the official interference with protected interests.

This is so because "[t]he ultimate standard set forth in the Fourth Amendment is reasonableness" (*Cady* v. *Dombrowski,* 413 U.S. 433, 439). Although "both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search" or seizure (*Almeida-Sanchez* v. *United States, supra,* 413 U.S. at 277, Mr. Justice Powell concurring), there are some circumstances in which a search or seizure may be reasonable without a warrant or without probable cause or even without both (*ibid.*). This is "the central inquiry under the Fourth Amendment—the reasonableness in all the circumstances of

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points may also be made routinely and without a warrant. But even if the Court holds that warrants are required for checkpoint searches, we would argue that warrants are not required for brief stops for questioning at checkpoints. Our analysis here with respect to roving patrol stops would apply as well to checkpoint stops.

[13] We acknowledge that even a brief stop of a vehicle to make a limited inquiry about a person's nationality may be a sufficient interference with an individual's "personal security" to constitute a "seizure" under the Fourth Amendment (*Terry* v. *Ohio, supra,* 392 U.S. at 19 and n. 16).

the particular governmental invasion of a citizen's personal security" (*Terry* v. *Ohio, supra,* 392 U.S. at 19).

The absence of a warrant for a particular search or seizure may raise warning signals, but whether that absence makes the search or seizure unreasonable depends at least in part upon the nature and scope of the intrusion.[14] For example, "broad and unsuspected governmental incursions into conversational privacy [through] electronic surveillance" may "jeopard[ize] * * * constitutionally protected speech" and, particularly when directed against "those suspected of unorthodoxy in their political beliefs," may make "Fourth Amendment protections * * * the more necessary" (*United States* v. *United States District Court,* 407 U.S. 297, 313–314). The magnitude of "the potential danger posed by unreasonable surveillance to individual privacy and free expression" (*id.* at 315) heightens the "risk" involved in relying solely on "unreviewed executive discretion" as a guarantee of reasonableness (*id.* at 317). In those circumstances, this Court concluded that "the needs of citizens for privacy and free expression may * * * be better protected by requiring a warrant before such surveillance is undertaken" (*id.* at 315).

When law enforcement officers use less "constitutionally sensitive means in pursuing their tasks" (*id.*

[14] The test in these cases, as this Court has held, is "not whether it was reasonable to procure a search warrant, but whether the search itself was reasonable." *United States* v. *Edwards,* 415 U.S. 800, 807; see *Cooper* v. *California,* 386 U.S. 58, 62.

at 317), however, a warrant may not always be required. An on-the-street investigative stop of a suspicious individual and a frisk of his person for concealed weapons may be conducted by a law enforcement officer without a warrant (*Terry* v. *Ohio, supra*).[15] Similarly, four members of this Court concluded in *Cardwell* v. *Lewis,* No. 72–1603, decided June 17, 1974, that the scraping of paint from the exterior of an automobile did not "invade * * * a right to privacy which the interposition of a warrant requirement is meant to protect" (slip op. 5, plurality opinion).

The brief stop of a vehicle in the border area to ask its occupants a few questions about their citizenship and right to be in the United States, while not trivial, does not constitute the kind of instrusion into protected privacy interests that was involved in even the limited search for aliens conducted in *Almeida-Sanchez.* The Immigration and Naturalization Service informs us that a stop for questioning at a checkpoint ordinarily takes no more than about 5 seconds per occupant and that even a roving patrol stop for questioning usually consumes no more than a minute. Such stops involve no search unless the officers have particularized probable cause. All that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States.

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[15] Of course, in the *Terry* context no warrant could have been obtained, since there was neither area probable cause nor individualized probable cause.

We submit that this momentary verbal encounter does not present the sort of dangers that a warrant is designed to protect against. In contrast to the situation as viewed by the majority in *Almeida-Sanchez,* there is here no claim of an "extravagant license to search" (413 U.S. at 268). A brief stop for questioning is a far less "constitutionally sensitive" (*United States* v. *United States District Court, supra,* 407 U.S. at 317) law enforcement method than a stop and search, and we believe that the need for and utility of advance judicial approval are correspondingly reduced.

Moreover, roving patrol operations are not easily adapted to an area warrant procedure. Roving patrol traffic checking operations are considered by the Border Patrol to be essential to supplement the fixed checkpoints as part of an overall program to deter illegal entry and apprehend illegal entrants. Although the need for some roving patrols—to cover one or two roads that bypass a major fixed checkpoint, for example—may be sufficiently foreseeable to permit advance planning, most roving patrol traffic checking operations can be employed effectively only if they can be used flexibly.

Basic roving patrol strategy is established on a regional basis, but the deployment of particular patrol cars and agents is ordinarily determined by field supervisors, who must take account of such variable factors as the season, the weather, the traffic flow, the time of day, manpower and patrol car availability, recent experience on a road or roads, information con-

cerning illegal activity, and so on. In areas with many bypass roads, one patrol car may be assigned to cover 10 or more roads and many square miles during a single shift.

For these reasons, the need for and assignment of roving patrols ordinarily cannot be anticipated for a future period but must be determined on a day-to-day basis consistent with regional policy.[16] Weekly or monthly warrants would therefore not be feasible. The Border Patrol has found that it would be impractical to seek daily warrants for each patrol car, in part because that would require an inordinate commitment of resources to the preparation of information to be presented in support of warrant applications. After this Court's decision in *Almeida-Sanchez,* therefore, the Border Patrol effectively discontinued the use of roving patrol traffic checking operations except when specific information was obtained concerning possible smuggling operations.

Even if these practical problems were not considered sufficiently disruptive of the Border Patrol's enforcement program to justify a roving patrol *search* without a warrant,[17] we submit that the balance of reasonableness shifts when the contemplated intrusion is limited to a brief investigative stop. The

[16] The instant case is illustrative of the problem. The "roving patrol" operation here involved was in response to immediate and unanticipated weather and manpower exigencies.

[17] Mr. Justice Powell stated in *Almeida-Sanchez* that "the roving searches are apparently planned in advance or carried out according to a predetermined schedule" (413 U.S. at 283). As we have indicated, that is true only with respect to a minority of roving patrol traffic checking operations.

result here should reflect the substantial difference between the intrusiveness of a search and the intrusiveness of a momentary "seizure."[18]

The situation here, we submit, is similar to that in *United States* v. *Biswell, supra,* where this Court upheld as "reasonable official conduct under the Fourth Amendment" (406 U.S. at 316) a warrantless search of a federally licensed firearms dealer's locked storeroom, conducted pursuant to an inspection program that was authorized by statute. Although, as Mr. Justice Powell stated in *Almeida-Sanchez,* "[o]ne who merely travels in regions near the borders of the country can hardly be thought to have submitted to inspections in exchange for a special perquisite" (413 U.S. at 281), drivers and motor vehicles are licensed by the states, and the lower federal courts have upheld routine warrantless stops of vehicles for license and registration checks.[19] A roving patrol immigration

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[18] One district court aptly stated: "It cannot be considered an arbitrary invasion of privacy merely to ask for proper identification in an area known to contain large numbers of illegal Mexican aliens, particularly when the person being questioned gives the appearance of being nervous and being of Mexican ancestry. This is especially true when it is the only feasible way to apprehend the seemingly endless parade of aliens who escape detection at the border" (*United States* v. *Montez-Hernandez, supra,* 291 F. Supp. at 716).

[19] See, *e.g., United States* v. *Croft,* 429 F. 2d 884 (C.A. 10); *Myricks* v. *United States,* 370 F. 2d 901 (C.A. 5), certiorari denied, 386 U.S. 1015; *Lipton* v. *United States,* 348 F. 2d 591 (C.A. 9). See generally Note, *Automobile License Checks and the Fourth Amendment,* 60 Virginia L. Rev. 666 (1974); Comment, *Freedom of the Road: Public Safety* v. *Private Right,* 14 DePaul L. Rev. 381, 407–409 (1965); Comment, *Interference*

stop, though not part of any state highway safety inspection program, is no more intrusive than the routine license check with which most motorists are familiar.

Moreover, as in *Biswell,* "the prerequisite of a warrant could easily frustrate" the enforcement scheme; "and if the necessary flexibility * * * is to be preserved, the protections afforded by a warrant would be negligible" (406 U.S. at 316). Warrantless roving patrol investigative stops, like the unannounced inspections of firearms dealers in *Biswell,* are specifically authorized by statute. The Court's conclusion in *Biswell* thus bears as well upon the resolution of the issue here. The Court there had "little difficulty in concluding that where * * * regulatory inspections further urgent federal interests, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute" (*id.* at 317).

Although immigration stops may not be "regulatory inspections" in furtherance of a licensing scheme, they involve a far less drastic intrusion than the unannounced searches sanctioned in *Biswell.* "[T]he possibilities of abuse and the threat to privacy" are of even less "impressive dimensions" in this context than in *Biswell* (*ibid.*).

Taking into account that "Congress has broad

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with the Right to Free Movement: Stopping and Search of Vehicles, 51 Calif. L. Rev. 907 (1963); Note, *Random Road Blocks and the Law of Search and Seizure*, 46 Iowa L. Rev. 802 (1961); Note, *The Driver's License "Display" Statute: Problems Arising from Its Application*, 1960 Wash. U.L.Q. 279.

authority to fashion standards of reasonableness for searches and seizures" (*Colonnade Catering Corp.* v. *United States, supra,* 397 U.S. at 77), we believe that Border Patrol officers may lawfully exercise their express statutory authority to make brief vehicle stops without warrants to inquire about the citizenship of the occupants. These limited intrusions do not pose the kind of dangers that might make it necessary to disregard the congressional judgment that warrants are not needed to ensure the reasonableness of the law enforcement conduct.

In arguing that a roving patrol investigative stop is not *per se* unreasonable if made without a warrant, we do not mean to suggest that an aggrieved person may not allege and prove in a particular factual setting that the stop of his automobile was in fact unreasonable or that the manner and scope of the officers' subsequent questioning were unlawful. We do say, however, that the Fourth Amendment values at stake are adequately protected when these claims are adjudicated *after* the stop and questioning and in the context of an adversary proceeding on specific facts.

As we showed earlier (pp. 20–21, *supra*), the stop and questioning in this case were authorized by 8 U.S.C. 1357(a)(1) and (3) and were reasonable under the Fourth Amendment. Border Patrol Agents Brady and Harkins were observing traffic on a highway frequently used to transport illegal entrants, at the site of the closed San Clemente checkpoint where thousands of illegal entrants are apprehended each

year. When they observed respondent's northbound vehicle containing three persons who appeared to be of Mexican descent, they were justified in stopping the car to question its occupants about their citizenship and their right to be in the United States. Once the vehicle was lawfully stopped, the officers' brief questioning of the passengers revealed that they were present in this country illegally.

We submit that this law enforcement action "was justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place" (*Terry* v. *Ohio, supra,* 392 U.S. at 20). The limited "seizure" of which respondent complains was not "unreasonable" under the Fourth Amendment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
MARK L. EVANS,
Assistant to the Solicitor General.
PETER M. SHANNON, JR.,
REUBEN H. WALLACE, JR.,
Attorneys.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2000

UNITED STATES OF AMERICA, *Petitioner,*

—v.—

JAMES ROBERT PELTIER, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 73-2050

UNITED STATES OF AMERICA, *Petitioner,*

—v.—

LUIS ANTONIO ORTIZ, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 73-6848

JOHN LEE BOWEN, *Petitioner,*

—v.—

UNITED STATES OF AMERICA, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74-114

UNITED STATES OF AMERICA, *Petitioner,*

—v.—

FELIX HUMBERTO BRIGNONI-PONCE, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, *AMICUS CURIAE*

EDWARD A. TOMLINSON
University of Maryland
School of Law
500 West Baltimore Street
Baltimore, Maryland 21201

VILMA S. MARTINEZ
SANFORD JAY ROSEN
JOAQUIN GUADALUPE AVILA
Mexican American Legal
Defense and Educational Fund
145 Ninth Street
San Francisco, California 94113

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BRIEF OF THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AMICUS CURIAE

Interest of Amicus Curiae [1/]

The Mexican American Legal Defense and Educational Fund (MALDEF) was established on May 1, 1968, primarily to secure the civil rights of Mexican Americans through litigation and education. In its efforts to assist the Mexican American community to achieve its rights under the law, MALDEF has been involved in litigation which has challenged the traditional barriers facing Mexican Americans: abridgement of participatory, constitutional, and political rights; unequal educational opportunity; discriminatory employment practices; unequal distribution of public services; and law enforcement misconduct. Because both citizens and lawfully admitted resident aliens of Mexican ancestry are frequently victimized be overzealous searches for illegal aliens, MALDEF has challenged such activities in numerous lawsuits. See, e.g., United States v. Guana-Sanchez, U.S.S.Ct. No. 73-820 (amicus brief); Garcia v. Hoobler, ___ F. Supp. ____, Civ. Act. 74-301-T (S.D. Cal. Jan. 8, 1975, Order granting defendants' Motions For Summary Judgment And To Dismiss, with leave to plaintiffs to amend it part).

1/ Letters of consent to the filing of this brief from each party in each case have been filed with the Clerk.

QUESTIONS PRESENTED

1. Whether the Fourth Amendment permits federal officers to conduct an unconsented, warrantless search of the interior of an automobile for illegal aliens when the federal officers do not have probable cause for believing either that the automobile to be searched contains illegal aliens, or that the automobile or its contents have recently crossed an international border.

2. Whether the Fourth Amendment permits federal officers to conduct at fixed checkpoints an unconsented, warrantless search of the interior of an automobile for illegal aliens when the federal officers do not have probable cause for believing that the automobile to be searched contains illegal aliens or that the automobile or its contents have recently crossed an international border.

3. Whether the rationale of Camara v. Municipal Court, 387 U.S. 523 (1967), should be extended to sustain, as a lawful administrative search, the warrantless, unconsented checkpoint search of an automobile's interior for illegal aliens conducted by federal officers, on the basis only of an area-wide equivalent of probable cause, and without probable cause for believing that the automobile to be searched contains illegal aliens.

4. Whether the Fourth Amendment permits federal officers to conduct an unconsented, warrantless stop of an automobile on the public highway to question the occupants concerning their right to be or to remain in the United States where the federal officers do not have reasonable grounds for believing that one or more of the occupants are illegal aliens?

STATEMENT OF THE CASES

The Ortiz Case [No. 73-2050].

On November 12, 1973, Border Patrol agents at the United States Border Patrol Immigration Checkpoint at San Clemente,[2] California, stopped Respondent Ortiz while he was driving a 1969 Chevrolet sedan northward on Interstate Highway 5 toward Los Angeles, California. (Appendix to Petition for Writ of Certiorari at 44A.)[3] The San Clemente checkpoint is located 62 air miles and 66 road miles north of the border and lies north of the densely populated San Diego metropolitan area. (App. Pet. in No. 73-2050 at 24A-25A.) Border Patrol agents at the checkpoint directed respondent's automobile to the secondary inspection area at the side of the road. While conducting a routine search, they found three aliens concealed inside the trunk of the automobile.

At the subsequent trial, District Judge Edward Schwartz ruled that the "San Clemente checkpoint is a permanent checkpoint and that the stopping of the vehicle and the search by the Border Patrol was a valid legal search." (App. Pet. in No. 73-2050

2/ Hereinafter cited as (App. Pet. in No. 73-2050 at __.)

3/ The Border Patrol is a division of the Immigration and Naturalization Service which is a part of the United States Department of Justice.

at 47A.) After a non-jury trial respondent was then convicted on three counts of transporting aliens who were in the country illegally, in violation of 8 U.S. C. § 1324(a)(1-4).

The Court of Appeals subsequently reversed respondent Ortiz's convictions on the authority of its en banc decision in United States v. Bowen, 500 F.2d 960, cert. granted, __U.S.__, 42 L. Ed.2d 47 (1974). In Bowen, the Court of Appeals held, primarily on the basis of this Court's decision in Almeida-Sanchez v. United States, 413 U.S. 266 (1973), that the Fourth Amendment prohibited a checkpoint search of an automobile for aliens conducted without a warrant and without probable cause unless the checkpoint search was the functional equivalent of a border search. For a checkpoint search to be the functional equivalent of a border search, there must be a reasonable certainty, or at least a probability that the vehicle stopped or its contents had recently crossed an international border. 500 F.2d at 966. Under this test the Ninth Circuit subsequently held in United States v. Morgan, 501 F.2d 1351 (9th Cir. 1974) (en banc), that routine searches of automobiles at the San Clemente checkpoint were not the functional equivalent of border searches. The Ninth Circuit, however, limited its decision in Bowen to checkpoint searches conducted after June 21, 1973, the date of this Court's decision in Almeida-Sanchez. Bowen, supra, 500 F.2d at 975-80. Since the search of respondent Ortiz's automobile occurred

after that date and was not deemed a border search, his conviction based on the illegally seized evidence was reversed.

The Bowen Case (No. 73-6848). Petitioner Bowen on January 19, 1971, was driving a pickup with a camper northward on California State Highway 86 when he was stopped at the United States Border Patrol Immigration Checkpoint. (Appendix at 35.)4/ The checkpoint on California State Highway 86 is located 36 air miles and 49 road miles north of the Mexican Border. (App. Pet. in No. 73-2050 at 30A); the population centers of Heber, El Centro, Brawley, Imperial, Westmoreland and Indio lie between the checkpoint and the border. (App. in No. 73-6848 at 39.) Petitioner satisfied the Immigration Officer on Duty as to his United States citizenship (App. in No. 73-6848 at 36). The officer noticed nothing suspicious or unusual about petitioner Bowen or the camper (App. in No. 73-6848 at 41), but nevertheless, asked him to open up the back of the camper to search for illegal aliens (App. No. 73-6848 at 36). Petitioner Bowen opened the door of the camper, and the officer immediately detected the smell of marijuana (App. in No. 73-6848 at 41). The officer then entered the interior of Bowen's camper through a rear door and, with the assistance of a flashlight, discovered a quantity of marijuana (App. in No. 73-6848 at 36 and 43-47). No illegal aliens were discovered.

4/ Hereinafter cited as (App. in No. 73-6848 at __.).

Bowen's motion to suppress the evidence was denied on August 23, 1971, and he was subsequently convicted by a jury on August 31, 1971 of smuggling marijuana into the United States from Mexico, transporting marijuana, possessing depressant and stimulant drugs in violation of federal law. The Ninth Circuit initially affirmed the convictions in United States v. Bowen, 462 F.2d 347 (9th Cir. 1972), but this Court then remanded the case to the Ninth Circuit for further consideration in light of Almeida-Sanchez, 413 U.S. 915 (1973). On remand, the Ninth Circuit held that routine immigration searches at fixed checkpoints removed from the border, conducted without a warrant or probable cause, violated the Fourth Amendment. United States v. Bowen, 500 F.2d 960 (9th Cir. 1974) (en banc), cert. granted, ___ U.S. ___, 42 L.Ed.2d 47 (1974). Nevertheless, they affirmed Bowen's conviction since the search of his camper occurred prior to this Court's decision on June 21, 1973 in Almeida-Sanchez.

The Brignoni-Ponce Case (No. 74-114). Respondent Brignoni-Ponce on March 11, 1973, was driving north on Interstate Highway 5 near San Clemente, California, when his car was stopped by agents of the United States Border Patrol. (Appendix at 5, 8.)5/ The checkpoint was closed due to lack of manpower and inclement weather, but two Border Patrol agents were on duty parked in a patrol car observing northbound traffic. (App. in No. 74-114 at 6.) The patrol car was parked at a 90° angle to the highway with its headlights on. In the early evening hours, the agents observed Brignoni-

5/ Hereinafter cited as (App. in No. 74-114 at __.).

Ponce's car going north and decided that they "wished to inspect" it. (App. in No. 74-114 at 6.) The agents' desire to inspect the car was based solely on the occupants' Mexican appearance. (App. in No. 74-114 at 9.) Upon questioning the passengers in Brignoni-Ponce's vehicle concerning their citizenship, the agents determined that they were aliens illegally in the United States. After unsuccessfully challenging the validity of the stop, Brignoni-Ponce was convicted of two counts of transporting illegal aliens in violation of 8 U.S.C. 1324(a)(2). Furthermore, the court rejected the government's attempt to distinguish this case from Almeida-Sanchez on the grounds that Almeida-Sanchez involved a search rather than a stop. The Ninth Circuit reasoned that Almeida-Sanchez "reflects at least as much concern with the initial stop as with the subsequent search." 499 F.2d at 1111. Thus, for purposes of Fourth Amendment protections, roving patrol searches as well as roving patrol stops are prohibited.

Since the stopping of Brignoni-Ponce's automobile and the discovery of illegal aliens occurred prior to the decision announced in Almeida-Sanchez, an issue of retroactive application was raised. In United States v. Peltier, 500 F.2d 985 (9th Cir. 1974) (en banc), the Ninth Circuit held that Almeida-Sanchez would be applied to similar cases pending an appeal at the time of this Court's decision in Almeida-Sanchez. However, in cases involving fixed checkpoint searches conducted prior to Almeida-Sanchez, there would be no retroactive application. United States v. Bowen, 500 F.2d 960 (9th Cir. 1974) (en banc). Since

the Ninth Circuit characterized Brignoni-Ponce's stop as a roving patrol stop rather than a fixed checkpoint stop, Almeida-Sanchez was applied retroactively in this case, resulting in the reversal of Brignoni-Ponce's conviction.

The United States Court of Appeals for the Ninth Circuit reversed the conviction. United States v. Brignoni-Ponce, 499 F.2d 1109 (9th Cir. 1974) (en banc). The Court of Appeals unanimously held that a warrantless stop of a vehicle to inquire as to the citizenship of the occupants is permissible under the Fourth Amendment only if the Border Patrol agents have a "founded suspicion" that the occupants of the vehicle are aliens whose presence in this country is unlawful. 499 F.2d at 1112. The mere fact that Brignoni-Ponce and his passengers appeared to be of Mexican descent did not provide the agent with adequate cause to stop the automobile.

The Peltier Case (No. 73-2000). On February 28, 1973, Respondent Peltier was driving northward on United States Route 395 near Temecula, California, when his automobile was pursued and stopped by a roving border patrol. The Border Patrol officers then searched the trunk of the automobile for concealed aliens. The stop took place approximately 70 air miles north of the Mexican border. The Border Patrol agents decided to stop and search Peltier's automobile because he appeared to be of Mexican descent and was driving an old model car. After stopping the car, the agents also observed that it bore out-of-state license plates, that Peltier was alone in the car, and that there were some

clothes in the back seat. Upon searching the car, the agents did not discover any illegal aliens, but did discover a quantity of marijuana in the trunk. Peltier was subsequently convicted in the United States District for the Southern District of California of possessing marijuana with intent to distribute in violation of 21 U.S.C. 844(a)(1), after Peltier's motion to suppress the marijuana as evidence was denied. Subsequent to the District Court's decision, this Court held in Almeida-Sanchez that a warrantless roving patrol search of an automobile for concealed aliens violates the Fourth Amendment when the Border Patrol agents have acted without probable cause for believing that the automobile contained illegal aliens. The Court of Appeals for the Ninth Circuit then reversed Peltier's conviction on the authority of Almeida-Sanchez. United States v. Peltier, 500 U.S. 985 (9th Cir. 1974). Although the roving patrol search in this case occurred before June 21, 1973, the date of this Court's decision in Almeida-Sanchez, the Ninth Circuit held that Almeida Sanchez "should be applied to similar cases pending an appeal on the date the Supreme Court's decisions was announced." 500 F. 2d at 986 (footnote omitted).

SUMMARY OF ARGUMENT

Over the last several decades, this Court has developed a substantial body of Fourth Amendment law. This body of law emphasizes probable cause as the normal predicate for a constitutionally valid search of an automobile's interior. While a somewhat lesser standard may justify the investigatory stop of a person or of an automobile on a public highway, random or routine stops have not received the Court's approval. A separate rationale for routine administrative searches has been developed, but that rationale has so far been limited to cases where there are at least the safeguards of the warrant process or where intensively regulated businesses are involved. Border searches have also received separate treatment, but the government recognizes that the instant four cases do not involve border stops or searches. (Brief for Petitioner United States in No. 73-2050 at 16.)

Almeida-Sanchez v. United States, 413 U.S. 266 (1973) is consistent with this body of law. In this amicus brief MALDEF argues that this Court's basic Fourth Amendment jurisprudence not only dictated the result in Almeida-Sanchez but also requires the Court to condemn the searches and stops in the instant four cases. Automobile searches at fixed checkpoints are essentially no different from automobile searches conducted by roving border patrols, and investigatory stops of automobiles are subject to the same prohibition of routine and random searches. The application of this Court's basic Fourth Amendment law to these cases is especially important to

those Mexican Americans, both citizens and lawfully admitted aliens, who are the actual or potential victims of automobile stops and searches conducted by Border Patrol agents looking for illegal aliens. The application of basic Fourth Amendment principles to these cases would operate to vindicate the rights of United States citizens of Mexican descent, and lawfully resident aliens of similar descent, to travel on the public highway free of random, discriminatory or otherwise unreasonable searches and seizures.

Since no new law is involved in these cases, the basic Fourth Amendment principles developed by this Court should be applied in these cases. Thus, the judgments of the United States Court of Appeals for the Ninth Circuit in Ortiz (No. 73-2050), Brignoni-Ponce (No. 74-114) and Peltier (No. 73-2000), reversing the respondent convictions, should be affirmed, while the judgment of the United States Court of Appeals for the Ninth Circuit in Bowen (No. 73-6848), affirming the petitioner's conviction, should be reversed. 6/

6/ This brief does not present additional argument on the retroactivity issue presented in Bowen (No. 73-6848), Brignoni-Ponce (No. 74-114) and Peltier (No. 73-2000). On this issue MALDEF adopts the arguments advanced by each of the defendants.

ARGUMENT

I

PROBABLE CAUSE IS REQUIRED FOR AN UNCONSENTED WARRANTLESS SEARCH BY FEDERAL OFFICERS OF THE INTERIOR OF AN AUTOMOBILE FOR ILLEGAL ALIENS

The defendants in these cases, Ortiz in No. 73-2050, Brignoni-Ponce in 74-114, Peltier in 73-2000 and Bowen in 73-6848, were all doing what hundreds of thousands, if not several million, Americans do every day: they were lawfully driving an automobile on a public highway within one hundred miles of an external boundary of the United States. Border Patrol agents stopped, and in three of the four cases searched, the defendants' automobiles for illegal aliens.

In Ortiz (No. 73-2050), the respondent was stopped and his automobile searched for illegal aliens at a permanent immigration checkpoint on Interstate Route 5 near San Clemente, California, about 62 miles from the Mexican border. (App. Pet. in No. 73-2050 at 43A-45A.) In Bowen (No. 73-6848), the petitioner was stopped and his automobile searched at a similar checkpoint on California State Highway 86 approximately 36 air miles and 49 highway miles north of the Mexican border. United States v. Bowen, 500 F.2d 960, 961 (9th Cir. 1974). Both cases involved routine searches where the Border Patrol officers who conducted the searches had no reason to believe that the drivers of the automobile were other than innocent and law-abiding individuals exercising their rights to operate a motor vehicle on a public

highway within one hundred miles of an external border.

In Brignoni-Ponce (No. 74-114), the agents stopped but did not search the respondent's automobile. The stop occurred to the north of a fixed checkpoint not then in operation. The officers' decision to stop the vehicles was based solely on the occupants' Mexican appearance. (App. No. 74-114 at 9.)

In Peltier (No. 73-2000), the agents both stopped and searched the respondent's automobile at a spot approximately a mile and a half north of a checkpoint that was also not in operation. The agents acted because Peltier was alone driving an old model car with out-of-state license plates in an area the offices knew to be frequented by smugglers of illegal aliens.

This Court has consistently required probable cause as the minimum requirement for a search by federal officers of an automobile stopped on a public highway. Carroll v. United States, 267 U.S. 132, 149 (1925) ("On reason and authority the true rule is that if the search and seizure without a warrant are made upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid."). The officers who make the stop must have probable cause for believing that the particular automobile to be searched is carrying seizable items that are the object of the search. Coolidge v. New Hampshire, 403 U.S. 443, 460-62 (1971); Chambers v. Maroney, 399 U.S. 42, 48, 51 (1970): See generally, Note, Warrantless

Searches and Seizures of Automobiles, 87 HARV.L. REV. 835 (1974). This probable cause requirement should be applied to the automobile searches in the instant cases to avoid the creation of a Fourth Amendment free-fire zone in the hundred mile wide strip contiguous to an external boundary of the United States.

Carroll v. United States, 267 U.S. 132 (1925), is the leading case explicitly recognizing the probable cause requirement for automobile searches on public highways. In Carroll, federal officers discovered and seized contraband liquor during the course of a warrantless search of an automobile stopped on a public highway. Federal prohibition agents at that time faced a law enforcement problem comparable in magnitude to that faced today by the Border Patrol. The transportation of contraband liquor by automobiles was an essential part of most boot legging operations just as the transporting of illegal aliens by automobiles in an important part of most alien smuggling operations.

Although recognizing the significant constitutional interest under the Eighteenth Amendment advanced by the officers' actions, nevertheless, in Carroll the Court required that warrantless searches and seizures of contraband located in automobiles be predicated upon probable cause, and held that: "[t]he measure of legality of such a seizure is, ...that the seizing officer shall have reasonable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported." 267 U.S. at 155-54. The Court further held that the Fourth Amendment

guaranteed to travellers on a public highway "a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise. 267 U.S. at 153.

If the Fourth Amendment requires that federal agents have probable cause for believing that a specific automobile is carrying contraband liquor before they search that automobile for the liquor, it also requires that federal agents have probable cause for believing that a specific automobile is carrying illegal aliens before they search that automobile for the aliens. As stated by the Court in Almeida-Sanchez v. United States, 413 U.S. 266, 269 (1973): "...[T]he Carroll doctrine does not declare a field day for the police in searching automobiles. Automobile or no automobile, there must be probable cause for the search." (footnote omitted)

Almeida-Sanchez merely reiterated the well established principle that automobiles are protected by the Fourth Amendment. This protection is triggered by an individual's expectation of privacy, Katz v. United States, 389 U.S. 347, 351-52 (1967), and is not dependent on the type of contraband sought to be seized. Thus the mere fact that illegal aliens are the targets of a search should have no bearing on the probable cause requirement afforded by the Fourth Amendment. Such protection is warranted in the cases at bar, moreover, since searches of motor vehicles for illegal aliens are similar in their intrusiveness into constitutionally protected areas as is the search for contraband liquor. The federal agents

may search in the trunk, under the hood, in the interior of a camper or of a pickup truck, behind the back seat, and in any other area of a vehicle where a human being could reasonably be concealed. In Almeida-Sanchez, for example, the agents searched under the rear seat of the automobile, which the Court of Appeals concluded was a place where an alien might conceal himself by removing the springs, 452 F.2d 459, 461 (9th Cir. 1971), rev'd 413 U.S. 266 (1973), while in Bowen (No. 73-6848) and in Peltier (No. 73-2000), respectively, the agents searched the interior of a camper truck and the trunk of an automobile. In United States v. Madueno-Astorga, 503 F.2d 820, 821 (9th Cir. 1974), the agents even removed the back seat of an automobile when the driver was unable to open the trunk.

In the course of these searches federal agents examine areas of the automobile that are private and closed to public view; they may even come across, in "plain view", seizable items other than the illegal aliens which are the object of their searches. In Almeida-Sanchez and many other cases marijuana has been found, and the drivers have been prosecuted for the illegal transportation of marijuana rather than the illegal trasportation of aliens. See, e.g., United States v. Phillips, 496 F.2d 1395 (5th Cir. 1974); United States v. Nevarez-Alcantar, 495 F.2d 678 (10th Cir. 1974); United States v. Martinez-Miramontes, 494 F.2d 808 (9th Cir. 1974). This phenomenum has led at least one circuit court judge to comment in the related area of airport searches that "[i]t is passing strange that most of these airport searches find narcotics and not bombs, which might cause us to pause in our

rush toward malleating the Fourth Amendment in order to keep the bombs from exploding." United States v. Legato 480 F.2d 408, 414 (5th Cir. 1973) (Goldberg, J., concurring), cert. den., 414 U.S. 979 (1973).

To prevent abuses in such searches, the scope of the search should be limited by the nature of the item sought to be seized. For example, a search of an automobile for illegal aliens does not authorize a search of the occupants or of the handbags or other similar containers in the automobile. See United States v. Di Ree, 332 U.S. 581, 586-587 (1948). The application of this familiar principle to the instant cases is conceded by the United States in Ortiz. (No. 73-2050) (Brief at 29.)

Certainly, this Court has not vitiated the probable cause requirement for the search of the interior of an automobile on the grounds that such a search is less intrusive than a search of a person or of a dwelling. Although for purposes of the Fourth Amendment there is some constitutional difference between searches of houses and of cars, Chambers v. Maroney, 399 U.S. 42 (1970), this difference results from the high degree of mobility enjoyed by motor vehicles and only permits law enforcement officers in some circumstances to dispense with the warrant requirement. Nothing has affected the probable cause requirement established in Carroll for motor vehicle searches. 399 U.S. at 51. In this respect Cardwell v. Lewis, ___ U.S. ___, 41 L.Ed.2d 325 (1974), is consistent with the Carroll-Chambers line of decisions because in Cardwell, the Court merely upheld a warrantless examination or "search," based on pro-

bable course, of the tire tread and exterior paint of the defendant's automobile. The observation in the plurality opinion, 41 L. Ed.2d at 335, that a person has less of an expectation of privacy in a motor vehicle than in a dwelling, and that automobile searches are therefore less intrusive than residential searches, was not made in the context of the search of the interior of an automobile or camper. If Cardwell had involved an interior search, the plurality's statement that automobiles are seldom a "repository of personal effects" and that their "contents are in plain view" would simply not be true. Millions of Americans carry personal effects in private areas of their automobile, such as the trunk or the glove compartment or the interior of a camper. These areas are concealed from public view by the exterior of the vehicle. An expectation of privacy in one's personal effects should not be defeated simply because one transports them on a public highway. We are a free and mobile society whose members frequently change residences, and who frequently motor to vacations at summer homes, campsites and resort hotels. Surely, our household effects are not fair game for an unconsented warrantless non-probable cause search simply because they are in transit in the interior of a motor vehicle on a public highway. As noted in Coolidge v. New Hampshire, 403 U.S. 443, 461-62(1971), "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." This Court therefore should not sanction warrantless interior automobile searches on less than probable cause on the ground that such searches are less intrusive than other searches.

A final consideration to be taken into account concerns a widespread practice of apprehending illegal aliens by state and local law enforcement agencies. In the Southwest, city police, county sheriffs, and other law enforcement officers often participate in stopping, detaining, and interrogating persons to determine their citizenship. E.g., United States v. Mallides, 473 F.2d 859 (9th Cir. 1973) (two city police officers stopped an automobile due to their suspicion that the car contained illegal aliens); United States v. Guana-Sanchez, Cr. No. 72 CR 50 (Unreported decision, N.D. Ill. June 8, 1972), affirmed, 484 F.2d 590 (7th Cir. 1973), cert. granted, ___ U.S. ___, 41 L.Ed.2d. 1138 (1974) (No. 73-820). If the protections afforded by the Fourth Amendment are not made applicable to these stops, then state and local law enforcement officials can stop any person of Mexican descent ostensibly for the purpose of determining the person's citizenship. Thus local law enforcement officials will be able to circumvent the guarantees provided by the Fourth Amendment simply by relying on the wide discretion afforded to immigration officers pursuant to 8 U.S.C. §1357(a)(1). See United States v. Bowman, 487 F.2d 1229 (10th Cir. 1973) (where immigration officials were held to be empowered to stop individuals to determine their citizenship without a warrant, without probable cause, and even without reasonable suspicion that the persons are illegal aliens).

Thus both to identify further the limitations on the stop and search powers of federal Border Patrol officers, and to help prevent state and local police circumvention

of the Fourth Amendment rights of Mexican appearing individuals, this Court should apply the probable cause requirement to unconsented, warrantless searches of automobiles by federal officers seeking illegal aliens.

ARGUMENT

II

PROBABLE CAUSE IS REQUIRED FOR AN UNCONSENTED WARRANTLESS SEARCH BY FEDERAL OFFICERS OF THE INTERIOR OF AN AUTOMOBILE FOR ILLEGAL ALIENS CONDUCTED AT A FIXED CHECKPOINT.

In Ortiz (No. 73-2050) and in Bowen (No. 73-6848) the automobile searches were conducted at fixed border patrol checkpoints, at San Clemente, California, and on California State Highway 86, respectively, while in Peltier (No. 73-2000) the respondent's automobile was stopped and searched by a roving border patrol. In Brignoni-Ponce (No. 74-114) there was no automobile search. The government concedes that the fixed checkpoint at San Clemente, Brief for Petitioner in Ortiz, No. 73-2050 at 16, is not the functional equivalent of the border permitting a warrantless full-scale border-type search of a vehicle for aliens or contraband because it cannot be said with any degree of assurance that the vehicles searched or their contents had recently crossed the border. This concession would also seem to cover the checkpoint on California State Highway 86 which the Court of Appeals in United States v. Bowen, 500 F.2d 960, 966 (9th Cir. 1973) (en banc), specifically found not to be the functional equivalent of the border since there was no reasonable certainty or even probability that the vehicles searched or their contents had recently crossed an international border. The government nevertheless argues in these cases that Almeida-

Sanchez v. United States, 413 U.S. 266 (1973), only condemns warrantless automobile searches for aliens conducted without probable cause by roving patrols and does not affect similar searches at fixed checkpoints. This distinction is untenable, and the Fourth Amendment, as consistently construed by this Court from Carroll v. United States, 267 U.S. 132 (1925), through Almeida-Sanchez in 1973, prohibits both roving patrol and fixed checkpoint searches for aliens that are conducted by federal agents without consent, without a warrant and without probable cause.

The fixed checkpoints in these cases are not "fixed" by any immutable necessity or by any court order but by executive officials within the Border Patrol. The government recognizes that the sites for fixed checkpoints are selected "as the result of careful study by relatively high-level officials of the Border Patrol." (Brief for Petitioner in Ortiz, No. 73-2050 at 13.) Even assuming that the Border Patrol has engaged in careful study in selecting the sites for fixed checkpoints, additional study, especially of the data collected from the operation of existing checkpoints, may convince the Border Patrol to open new checkpoints or to move existing checkpoints. A "fixed" checkpoint is therefore fixed only by executive decision and may move and become "roving" by executive decision. There is nothing inherently fixed about any checkpoint's location. While some locations may be more suitable geographically than others, functionally a checkpoint is very mobile. The signs, traffic cones, lights, and uniformed officers which are

the essential elements of a checkpoint may readily be assembled, with portable or temporarily installed equipment if necessary, at a new location where there is an adequate stretch of open road to permit safe operation.

The Border Patrol has statutory authority to search vehicles for aliens, and presumably to establish checkpoints to accomplish these searches, within a reasonable distance from any external boundary of the United States. 8 U.S.C. 1357(a)(3). "Reasonable distance" has been defined by regulation to mean 100 miles in most cases. 8 C.F.R. 287.1. While this statute and regulation cannot authorize the Border Patrol to conduct otherwise unconstitutional searches, Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973), they do authorize the Border Patrol within constitutional limits to site checkpoints and search vehicles, operated to uncover illegal aliens, anywhere within one hundred miles of the border. Under the authority conferred by the statute and the regulations, the Border Patrol could conceivably establish a "fixed" checkpoint anywhere on the New Jersey Turnpike to search vehicles for illegal aliens.[7/]

7/ The government recognizes that checkpoint searches at Times Square, and presumably also on the New Jersey Turnpike, would be unreasonable and hence unconstitutional because the local conditions at those sites do not provide the "area-wide equivalent of probable cause" which the government argues is the sole constitutional

More realistically, the Border Patrol may find at some future date that it is more effective to replace its temporary checkpoints with a system of mobile checkpoints on both main and back roads that operate to surprise the smuggler of illegal aliens by moving or "roving" from one location to another. Since no checkpoint is permanently fixed and since mobile checkpoints are no different than roving patrols, the Fourth Amendment prohibits warrantless automobile searches for aliens without probable cause at Border Patrol checkpoints.

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prerequisite for a checkpoint search. (Brief for Petitioner in Brignoni-Ponce, No. 70-114, at 19.) This recognition that many potential checkpoint locations would be unconstitutional undermines the government's contention that subsequent judicial consideration of the reasonableness of the checkpoint's operation in the context of a motion to suppress is an adequate substitute for advance judicial approval of the checkpoint's operation through a warrant procedure. How many innocent motorists will be subject to unconstitutional vehicle searches at a checkpoint whose location is improper before a guilty one is found who subsequently challenges the search by a motion to suppress in a criminal prosecution? The number may be very high indeed because the subsequent judicial challenge may be slow in coming, particularly if the government exercises its discretion, as it frequently does, not to prosecute illegal aliens criminally but to deport them.

There is another, more basic reason why fixed checkpoint searches of automobiles for illegal aliens should be treated the same as roving patrol searches. In Almeida-Sanchez, the Court condemned the roving patrol search because it "was conducted in the unfettered discretion of the members of the Border Patrol, who did not have a warrant, probable cause or consent." 413 U.S. at 268 (footnote omitted). Checkpoint searches are also conducted in the "unfettered discretion" of Border Patrol agents without a warrant, probable cause or consent. Only a small percentage of the automobiles that pass through a fixed checkpoint are searched for aliens. At the busy San Clemente checkpoint only three per cent of the vehicles are even stopped for inquiry regarding the citizenship of the occupants and for possible search of the car. (App. Pet. in No. 73-2050 at 16A-17A.) At the checkpoint on California State Highway 86 the Border Patrol is more active and seventy-five per cent of the vehicles are stopped for inquiry but only ten or fifteen per cent are searched for illegal aliens. (App. Pet. in No. 73-2050 at 30A). Nationwide, the Border Patrol estimates that approximately 27.4 million vehicles passed through "fixed" checkpoints in fiscal year 1974. Only 320,000 vehicles, slightly over one per cent of the total, were subjected to a physical inspection or search for aliens. (Brief for Petitioner in Ortiz, No. 73-2050 at 28-29.)

The "fixed checkpoint" thus closely resembles the roving border patrol because only a small percentage of the vehicles encountered or observed by the federal agents

operating either the "fixed" checkpoint or the roving patrol are stopped and searched. The majority of the Court of Appeals recognized this important factor in United States v. Bowen, 500 F.2d 960, 964 (9th Cir. 1974) (en banc): "Since not all vehicles passing through a checkpoint are stopped, and since not all vehicles stopped are searched, the officer at the checkpoint still retains a good deal of discretion to 'single out' some travelers for stops or intrusive searches."

No doubt some roving patrol operations, especially those conducted at night, are more frightening or traumatic to the driver and occupants of the car searched than are the more anticipated and orderly "fixed" checkpoint searches. However, it is only the stop by the roving patrol which may have a different traumatic effect and not the subsequent search of the private areas of the vehicle's interior. The search of the vehicle is exactly the same regardless of whether it takes place on the open highway or at a "fixed" checkpoint. Furthermore, Border Patrol agents on roving patrol apparently are uniformed and in official vehicles. The indicia of lawful authority thus quickly become evident to a driver stopped by a roving border patrol, just as the indicia of lawful authority are evident to the driver who approaches a "fixed" automobile checkpoint. In both instances a search of the automobile for illegal aliens is normally conducted at the side of the road to avoid blocking ongoing traffic. The search -- the warrantless, unconsented search, not based upon probable cause -- is an indignity that innocent drivers and passengers should not be subjected

to at the whim of the Border Patrol agent. The crucial factor is whether or not there is probable cause for the search by law enforcement officers, and not whether the search takes place at night or in the daytime or on the open road or at a "fixed" checkpoint.

The unfettered discretion of Border Patrol agents at "fixed" checkpoints to search some vehicles for illegal aliens while not searching the great majority of vehicles which pass through the checkpoints adversely affects the rights of Mexican Americans in two respects. First, the initial stop is usually based upon constitutionally impermissble criteria, e.g., a person's Mexican appearance. Second, these arbitrary stops infringe the victims' constitutional right of interstate travel.

In both Brignoni-Ponce (No. 74-114) and in Peltier (No. 73-2000), the Border Patrol agents stopped the respondents' automobiles because the occupants appeared to be of Mexican descent. It is not a crime to be of Mexican descent, nor is a person's Mexican appearance a proper basis for arousing an officer's suspicions. Those broad descriptions literally fit millions of law abiding American citizens and lawfully resident aliens. United States v. Camacho-Davalos, 488 F.2d 1383 (9th Cir. 1973). The Ninth Circuit has rightly condemned law enforcement officers, both state and federal, who stop cars because their occupants fit the loose description of "Mexican appearing." United States v. Mallides, 473 F.2d 849 (9th Cir. 1973)(state officers); United States v. Brignoni-Ponce, 499 F.2d 1109

(9th Cir. 1974)(Border Patrol agents).

A person's racial or ethnic background or appearance is a neutral factor in appraising probable cause or reasonable suspicion, United States v. Bugarin-Casas, 484 F.2d 853, 854 (9th Cir. 1973), cert. den., ___ U.S. ___, 94 S. Ct. 881 (1974); and to permit law enforcement officers to base their decision to stop or search an automobile on the racial or ethnic appearance of the occupants would be to sanction the very same discriminatory law enforcement condemned in Yick Wo v. Hopkins, 118 U.S. 356 (1886) as violative of the Equal Protection Clause of the Fourteenth Amendment. Such a conclusion is compelled by this Court's recent decisions characterizing Mexican Americans as an identifiable group for Fourteenth Amendment purposes. See Keyes v. School Dist. No. 1, Denver, 413 U.S. 189 (1973); White v. Regester, 412 U.S. 755 (1973); Hernandez v. Texas, 347 U.S. 475 (1954). This discrimination is inevitable if Border Patrol agents enjoy unfettered discretion to search whatever vehicles they chose, since they will naturally continue to focus on drivers of Mexican descent or who are of Mexican appearance, or whose passengers meet these criteria, as the most likely targets for routine or random vehicle searches.

Persons of Mexican descent or appearance enjoy the same constitutional right to travel on the public highways free of unreasonable searches and seizure as do other United States citizens and lawful resident aliens. The basis for this fundamental right was recognized in Carroll v.

United States, 267 U.S. 132, 153-54 (1925):

> Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.

The Carroll decision, of course, is fully consistent with more judicial and congressional decisions extending and protecting the constitutional right of interstate travel. See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969), modified, Edelman v. Jordan, ___ U.S. ___, 94 S. Ct. 1347 (1974); Title II of the Civil Rights Act of 1964, 42 U.S.C. §§2000a et seq. (Public Accomodations).

The records in the cases at bar clearly demonstrate the substantial danger of infringement of the right of travel resulting from the present operations of "fixed"

checkpoints. By imposing the protections afforded by the probable cause requirement on searches conducted at "fixed" checkpoints, as they already have been imposed on the searches conducted by roving patrols, the Court will prevent further violations of the rights of Mexican Americans to travel on the highways without the fear of being stopped or searched merely because of their Mexican appearance.

ARGUMENT

III

WARRANTLESS UNCONSENTED CHECKPOINT SEARCHES OF AUTOMOBILE INTERIORS FOR ILLEGAL ALIENS CONDUCTED BY FEDERAL OFFICERS WITH ONLY AN AREA-WIDE EQUIVALENT OF PROBABLE CAUSE ARE NOT ADMINISTRATIVE SEARCHES PERMISSIBLE UNDER CAMARA v. MUNICIPAL COURT, 387 U.S. 523 (1967)

The government argues in Ortiz that there existed an area-wide equivalent of probable cause at the San Clemente checkpoint that made the automobile search constitutional even though the Border Patrol agents who conducted the search had no probable cause for believing or even a reasonable basis for suspecting that Ortiz's automobile was carrying illegal aliens. The government's chief authority for this argument is Camara v. Municipal Court, 387 U.S. 523 (1967). In Camara this Court held that an unconsented warrantless search of an apartment building by municipal building inspectors violated the Fourth Amendment but concluded that a warrant could be obtained on the basis of area-wide probable cause "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." 387 U.S. at 538. If there is area-wide probable cause, the constitutionality of the search of a dwelling for building code violations "will not necessarily depend upon specific knowledge of the condition of the particular dwelling." 387 U.S. at 538.

Camara reconciled the unique conflict between the homeowner's Fourth Amendment rights and the community's need to prevent and abate dangerous and unsanitary conditions. An unthinking and unhesitating application of Camara beyond the exceptional facts of such a case may lead to a general erosion of Fourth Amendment rights. Comment, Area Search Warrants in Border Zones: Almeida - Sanchez and Camara, 84 Yale L.J. 355, 370 (1974). Labelling a search as an administrative inspection does not eliminate the protective role of the Fourth Amendment. One of the hallmarks of a totalitarian society is the subjection of the citizenry to a myriad of routine administrative searches or inspections to ensure that the governed are not about to make any trouble for the government. Privacy and personal security, values which the Fourth Amendment is intended to protect, are lost in the process of identity checks and physical inspections. This Court should therefore be very hesitant in approving routine administrative "inspections" where federal officers lack the traditional probable cause to search.

The Court in Camara upheld the reasonableness of area code-enforcement because it found a long history of judicial and public acceptance, of such searches in the urban health context, a strong public interest that all such dangerous conditions be prevented or abated, and a relatively limited invasion of the urban citizen's privacy. The inspection of a dwelling for code violations was a relatively limited intrusion because the inspection was "neither personal in nature nor aimed at the discovery of evidence of crime." 387 U.S. at 537.

Searches of automobiles for illegal aliens, on the other hand, are personal in nature and aimed at the discovery of evidence of crime. The knowing transportation by automobile of illegal aliens is a felony punishable by a maximum of five years under 8 U.S.C. §1324(a)(2). Illegal aliens are thus a form of contraband, and searches of automobiles for illegal aliens are no different than searches of automobiles for contraband liquor. Both are searches for criminal evidence. Building codes, by comparison, are generally enforced by the inspector's issuance of an administrative compliance order to correct any violations discovered on the premises. The violation of the administrative order, not initial the presence of the code violation, is the criminal offense. Even if the presence of the code violation is itself a crime, as was the case under the New York City code provision cited in Camara, 387 U.S. at 531 n. 7, the penalties are generally light and the crime is one of the public welfare variety.

Building inspections are therefore administrative searches because their primary function is to insure that homeowners correct any violations on their premises. Vehicle searches for illegal aliens, on the other hand, are not transformed from searches for criminal evidence into permissible administrative searches simply because any illegal aliens discovered are normally deported rather than prosecuted criminally. It could just as well be argued that vehicle searches for untaxed liquor are administrative searches because the contraband liquor is always destroyed but the transporter may not always be prosecuted criminally. In

addition, smugglers of illegal aliens are prosecuted under 8 U.S.C. §1324(a)(2) for transporting illegal aliens, which is precisely what happened to Ortiz and Brignoni-Ponce in the instant cases.

While the illegal aliens who are passengers in the vehicle may be deported and not prosecuted criminally, the driver, who is the victim of the search, may well be prosecuted criminally, especially if he is an American citizen and therefore not subject to deportation. The Immigration and Naturalization Service's own reports indicate that during fiscal 1972, 2,927 violations of 8 U.S.C. §1324(a)(2), which punishes knowing transportation of illegal aliens, were presented to United States Attorneys for possible prosecution. Prosections were authorized in 731 or approximately one quarter of these cases. Only 873 violations of 8 U.S.C. §1324(a)(2) were closed by blanket or general waiver. By comparison, more than twenty times as many violations of 8 U.S.C. §1325, which punishes illegal entry, were closed administratively than were ever presented to tha United States Attorneys for possible prosecution. (A total of 376,197 violations of 8 U.S.C. §1325 were reported; of these only 16,783 were presented to the United states Attorneys for prosecution.) Hearings on H.R. 982 Before Subcommittee No. 1 of The House Committee on The Judiciary, 93rd Cong., 1st Sess., 31-32 (1973). Searches of automobiles for illegal aliens should therefore be treated in the same fashion as are searches of automobiles for contraband and other evidence of crime.

Camara is also distinguisable because

the need for building inspections for code violations is greater than is the need to search automobiles for illegal aliens. There is no way to determine whether the interior of a dwelling complies with a building code other than to inspect its interior. Illegal aliens may be apprehended in many ways in addition to searching the interior of vehicles on a public highway. Increased efficiency certainly is not a sufficient reason for subjecting all motorists within one hundred miles of our external boundary to arbitrary vehicle searches. Finally, the remaining reason advanced by the Court in Camara for modified search and seizure standards, the long history of judicial and public acceptance of area-wide building inspections, is not applicable in the context of vehicle searches for illegal aliens. "Although prior circuit court approval of these searches is technically a history of judicial acceptance it is insignificant in comparison with the history supporting the Camara court. Camara involved a practice that not only had been accepted for more than 150 years but also had been previously upheld by the Court in Frank v. Maryland." Comment, Area Search Warrant in Border Zones: Almeida - Sanchez and Camara, 84 Yale L.J. 355, 362 (1974).

For these reasons Camara should not be extended to permit area-wide probable cause to serve as the basis for automobile searches for illegal aliens in places as remote from the border as the San Clemente and California State Highway 86 checkpoints. The record does not indicate how many vehicles pass through these checkpoints annually or daily or how many vehicles are

searched, but it cannot be disputed that the overwhelming majority of vehicles potentially or actually subject to search are not transporting illegal aliens. While twenty or thirty illegal aliens may be apprehended in a normal 8 hour shift at San Clemente (App. Pet. in No. 73-2050 at 25A), the number of vehicles searched surely is much higher. If the approach were adopted that such limited results justified are wide searches for criminal evidence, large areas of this country might become in effect free-fire zones where area-wide searches for illegal aliens, or for other forms of contraband such as bombs, illegal handguns or narcotics, would be permissible because the relatively higher incidence of such contraband within the given areas would justify area-wide searches to uncover the evidence.

If area-wide probable cause is ever to justify vehicles searches for illegal aliens, advance judicial approval should be required through the warrant process, as it was in Camara for building inspections. Subsequent judicial consideration of the reasonableness of a program of adminstrative searches conducted on the basis of area-wide probable cause is not an adequate substitute for advance judicial approval because many innocent motorists will be subject to possible unconstitutional searches before a "guilty" one comes forward and subsequently changes the search by a motion to suppress in a criminal prosecution. See, infra, at p. n. . Furthermore, the government's argument that a warrant process is unworkable because the Border Patrol must retain a degree of surprise and flexibility in opening temporary checkpoints (Brief for Petitioner in Ortiz, No. 73-2050, at 41), indicates that the

Border Patrol wants to retain the authority to search at whim (or "seasoned judgment" as the government puts it) all vehicles in the Border area. The danger of arbitrary, discriminatory law enforcement adversely affecting the constitutional rights of innocent Mexican-Americans is too great to permit federal agents to conduct such searches without probable cause, without consent, and without advance judicial approval.

ARGUMENT

IV

THE FOURTH AMENDMENT DOES NOT PERMIT FEDERAL OFFICERS TO MAKE RANDOM, WARRANTLESS STOPS OF AUTOMOBILES ON THE PUBLIC HIGHWAY TO QUESTION THE OCCUPANTS CONCERNING THEIR RIGHT TO BE IN THE UNITED STATES.

In Brignoni-Ponce (No. 74-114), Border Patrol agents stopped respondent's automobile on the public highway and questioned its occupants as to their right to be in the United States. The stop did not take place at a fixed checkpoint but on the open highway. The Border Patrol agents who stopped respondent's automobile had observed many vehicles pass without stopping them before they stopped Brignoni-Ponce's automobile. The agents pursued and stopped the automobile for a routine immigration inspection solely because they observed that its three occupants appeared to be of Mexican descent; the agents had no basis for believing that either Birgnoni-Ponce or his two passengers were illegal aliens. 499 F.2d at 1112. The agents quite plainly intended to search the interior of the automobile and did so; but only after they had discovered that the passengers were illegal aliens.

The government contends that this "stop" and the subsequent search are not controlled by this Court's decision in Almeida-Sanchez v. United States, 413 U.S. 266 (1973). They claim that Almeida-Sanchez interpreted only 8 U.S.C §1357(a)(3), which

authorizes "...the board[ing] and search-[ing] for aliens... [of] any... vehicle...." The stop in the Brignoni-Ponce case, the government claims, was authorized under 8 U.S.C. §1357(a)(1), which authorizes Border Patrol agents "without warrant ...to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States...." Almeida-Sanchez, however did not turn on the nicety of the authorizing statute relied upon by the government. It was a decision examining the scope of Fourth Amendment protections. Even adopting the goverment's approach, its attempt to distinguish the instant case from Almeida-Sanchez, is unavailing.

The stop of Brignoni-Ponce's automobile was a "seizure" of the automobile and its occupants for Fourth Amendment purposes. "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." Terry v. Ohio, 392 U.S. 1, 16 (1968). If stopping a person walking on the street to inquire about his activities constitutes a "seizure" of the person, stopping an automobile on a public highway to question its occupants about their right to be in the United States similarly constitutes a seizure of the automobile and of its occupants. "A person whose vehicle is stopped by police and whose freedom to drive away is restrained is as effectively 'seized' as is the pedestrian who is detained." United States v. Mallides, 473 F.2d 859, 861 (9th Civ. 1973). The occupants plainly are not free to leave while the questioning con-

tinues. Conceivably the driver or owner of the automobile is free, if the agents do not assert a right to search the automobile, to direct any available third party to remove it from the scene to any location he desires. However, the automobile has, nevertheless, been forcibly stopped and immobilized on the public highway and must remain stopped until the inquiry of its occupants is completed or arrangements are made to conduct the inquiry at a place separate from the automobile.

Random, roving patrol stops or seizures of antomobiles on the public highway, therefore, impose seizures and indignities that cannot be brushed aside as modest intrusions undeserving of significant Fourth Amendment protections. The stops abridge the driver's "right to free passage without interruption or search." Carroll v. United States, 267 U.S. 132, 154 (1925). It also adversely affects his interests in personal security. Law enforcement officers who pursue automobiles and direct them to the side of the road normally have cause to believe that there has been a violation of the law. At least this is the popular understanding of what is involved when a driver is forced to the side of the road by a police officer. Drivers stopped in this fashion naturally inquire of themselves: Why me? What have I done? Why did they pick on me? It is therefore a significant intrusion on personal liberty if a person lawfully driving on the public highway is ordered by Border Patrol agents to pull over to the side of the road and is detained there by the agents until they have finished their inquiries. The intrusiveness of the stop is further demonstrated by the fact that the

agents may take advantage of the plain view doctrine to observe much of the automobile's interior and may in appropriate cases even frisk for weapons those occupants of the automobile whom they reasonably believe to be armed and dangerous. Adams v. Williams 407 U.S. 143 (1972).

This Court has not separately treated the level or quantum of cause required for the stopping of individual vehicles on a public highway. Probable cause is necessary to stop and search an automobile for contraband or other evidence of crime, Chambers v. Maroney, 399 U.S. 42 (1970), and there is no clear indication that a smaller quantum of information will suffice to justify a stop alone. This Court has in any case never sanctioned random and potentially discriminatory stops of automobiles. The Court's opinion in Almeida-Sanchez v. United States, 413 U.S. 266 (1973), reflects at least as much concern with the random stop of the defendant's automobile in that case as with the subsequent random search of the automobile's interior:

> "It is undenied that the Border Patrol had no search warrant, and that there was no probable cause of any kind for the stop or the subsequent search...."

413 U.S. at 268 (emphasis added).

> "[N]either this Court's automobile search decisions nor its administrative inspection decisions provide any support for the constitutionality of the stop and search in the present case...."

413 U.S. at 272 (emphasis added).

At the very least this Court should require for an investigatory stop of an automobile and the interrogation of its occupants by federal officers the same level of cause that is required for the investigatory stop and interrogation of a pedestrian. In both instances law enforcement officers "must be able to point to specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant... [t]he intrusion." Terry v. Ohio, 392 U.S. 1, 21 (1968). Any lesser standard would make a person's freedom of movement on the public highway subject to the inarticulate and unsubstantiated "hunches" of Border Patrol agents. 392 U.S. at 22.8/

8/ The stopping of automobiles by state and local police to check for operator's licenses and automobiles registrations raises different issues than do investigatory stops by Border Patrol agents. There is no way to determine whether the operator of a motor vehicle is properly licensed other than to stop the vehicle and question the driver. There are many ways to apprehend illegal aliens. Furthermore, the primary purpose of license checks is regulatory. In order to promote safety on the highways, police officers must be able to take reasonable measures to insure that only properly licensed drivers operate motor vehicles on the public highways. Despite these distinctions, there is nevertheless a division of authority on whether random vehicle stops to check operator's licenses are constitutional and there is a strong basis for arguing that to be constitutional stops for license checks must be conducted according to a systematic non-discretionary procedure and not on a random basis at the whim or uncontrolled discretion of police officers, Note, Automobile License Checks and the Fourth Amendment, 60 VA.L.REV. 666, 695-96 (1974).

The United States argues in Brignoni-Ponce (No. 74-114) that Section 287a(1) of the Immigration and Nationality Act, 8 U.S. C. §1357(a)(1), authorizes Border Patrol agents to stop any vehicle anywhere in the United States and question its occupants whenever the agents believe the vehicle contains aliens. (Brief of Petitioner in Brignoni-Ponce, No. 74-114, at 17-18.) The government does not indicate on what basis the agents believed Brignoni-Ponce or his passengers to be aliens. The government is evidently willing to accept the notion of alienage at a glance. For the agent believed that Brignoni-Ponce and his passengers were aliens simply because they looked like aliens, i.e., they appeared to be of of Mexican descent. Many United States citizens are of Mexican descent, and the government seemingly argues that the briefest glance at an individual by a Border Patrol agent permits the agent to arrive at a "belief" that the individual is not only of Mexican descent but also an alien from Mexico. Surely this approach gives free rein to the inarticulate and unsubstantiated hunches of Border Patrol agents and subjects Mexican Americans to discriminatory stops based solely on their racial appearance.

There is simply no rational basis for believing that a person of Mexican appearance traveling in an automobile on an Interstate Highway in Southern California is an alien, much less for believing that he is an alien whose presence in this country is illegal. Settlers and immigrants have come to this country from all corners of the globe, and most United States citizens today

bear to a greater or lesser extent the physical characteristics of persons dwelling in country or countries of origin. The physical characteristics of many Mexican American citizens may more clearly identify their country of origin than do the physical characteristics of citizens of Irish, German or other European descent. Mexico is also a country that shares a lengthy boundary with the United States and is the source of many illegal aliens within the United States. Nevertheless, to protect the constitutional rights of these Mexican American citizens and lawfully admitted aliens this Court should permit under 8 U.S.C. §1357(a)(1) the investigatory stop of a vehicle and the questioning of its occupants by the Border Patrol only when the Border Patrol agents have knowledge of specific and articulable facts that gives them reason to believe that the vehicle contains aliens whose presence in this country is illegal.[9/]

9/ The government recognizes that it is only the high incidence of illegal aliens in border areas of the country that justify investigatory stops under 8 U.S.C. §1357(a)(1) and searches under 8 U.S.C. §1357(a)(3). (Brief for petitioner in Brignoni-Ponce, No. 74-114 at 13; Brief of Petitioner in Ortiz, No. 73-2050 at 20) and does not advance the potentially broader justification that federal officers may stop and search in order to keep under surveillance aliens whose presence in this country is lawful. The object of the stops and searches conducted under those sections in these cases was the discovery of aliens whose presence in this country is illegal. See e.g., App. in No. 73-6848 at 36 where the Border

(cont. next page)

Even the government recognizes that there is a difference between "what the Fourth Amendment may tolerate on the one hand and what the Immigration and Nationality Act may authorize on the other" (Brief for Petitioner in Brignoni-Ponce, No. 74-114 at 16), and that 8 U.S.C. §1357(a)(1) constitutionally can only authorize investigatory stops of vehicles where there is an area-wide equivalent of "reasonable suspicion not amounting to probable cause." (Id. at 14.) The government argues that the Fourth Amendment permits Border Patrol agents to stop all vehicles in such areas to question the occupants on their right to be or to remain in the United States (id. at 8) and evidently treats the additional requirement that the agents believe that the occupants are aliens to be solely a statutory requirement under 8 U.S.C. §1357(a)(1) and not a constitional requirement. Where there is an area-wide equivalent of reasonable suspicion not amounting to probable cause, the government argues that the suspicion "need not be focused with particularity on the specific vehicle to be stopped. It may be based, instead, upon knowledge of conditions in the area as a whole." (Id. at 14.)

The government recognizes that conditions in many areas of the country would not justify random vehicles stops on an area-wide basis (id. at 19) but leaves the creation of such free fire-zones to be unfettered discretion of executive officials in the Border Patrol without any prior judicial

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Patrol agent testified on direct examination, "I asked him to open up the back of the camper for a search for illegal aliens."

approval through the warrant process. Although the government indicates in its brief (id. at 19) that conditions in New York City would not provide an area-wide equivalent of cause sufficient to justify random vehicles stops, recent statements by the Commissioner of the Immigration and Naturalization Service indicate that there are a high concentration of illegal aliens in the New York Metropolitan area, perhaps more than one million. (New York Times, December 29, 1974, p.1 col.5 and December 31, 1974, p.26 col.1, City Edition.) Might not the Border Patrol create a new area for random stops of vehicles in portions of the New York Metropolitan Area where a large number of illegal aliens are believed to be employed? At the very least any such program of area-wide stops should be subject to the prior control of the warrant process since the burden of obtaining a warrant is not likely "to frustrate the governmental purpose behind the search." Camara v. Municipal Court, 387 U.S. 523, 533 (1967).

The government evidently believes that area-wide cause for stopping vehicles and questioning their occupants exists throughout the border region (Brief for Petitioner in Brignoni-Ponce, No. 74-114 at 19). If Border Patrol agents can make a warrantless stop of Birgnoni-Ponce's automobile on an Interstate Highway, 60 or so miles from the border, they could just as readily do so on a residential street in San Diego, which is also in the border region. Mr. Justice Powell in his concurring opinion in Almeida-Sanchez envisioned a more particularized judicial definition of the relevant "area" when he spoke approvingly of advance judicial approval for roving patrol stops and

searches "on a particular road or roads for a reasonable period of time." 413 U.S. at 282. If the Border Patrol is given discretion to create at will broad areas throughout the country for random stops, it will be resolving by itself "the type of delicate questions of constitutional judgment which ought to be resolved by the Judiciary rather than the Executive." 413 U.S. at 284. (Powell, J., concurring.) In addition, before approving any program of area-wide stops, the judiciary could require safeguards to protect the rights of Mexican Americans from discriminatory stops based solely on their racial physical appearance.

CONCLUSION

For the above reasons, and those stated in the briefs of the parties supported by the amicus curiae, the decisions in Ortiz (No. 73-2050), Brignoni-Ponce (No. 74-114) and Peltier (No. 73-2000) should be affirmed, and the dcision in Bowen (No. 73-6848) should be reversed.

Respectfully submitted,

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VILMA S. MARTINEZ
SANFORD JAY ROSEN
JOAQUIN G. AVILA
Mexican American Legal Defense and Educational Fund
145 Ninth Street
San Francisco, CA 94103

EDWARD A. TOMLINSON
University of Maryland
School of Law
500 West Baltimore Street
Baltimore, MD 21201

No. 74-114

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA,
Petitioner,

v.

FELIX HUMBERTO BRIGNONI-PONCE,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

JOHN J. CLEARY
CHARLES M. SEVILLA
FRANK J. RAGEN
Federal Defenders of San Diego, Inc.
925 First Avenue, Suite 260
San Diego, California, 92101
(714) 234-8467 and 293-5240
Attorneys for Respondent

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

SUBJECT INDEX

TABLE OF AUTHORITIES

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ON WRIT OF CERTIORARI TO
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BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

I.

Whether consistent with the Fourth Amendment armed Border Patrol officers operating as a roving

patrol have the right to forcibly stop a vehicle travelling on an interstate highway 60 miles from an international border and to interrogate its occupants absent probable cause, a warrant, or founded suspicion?

II.

Whether the stop of respondent's vehicle and subjection of the occupants to interrogation solely because the occupants appeared to be of Mexican descent violated the Fourth and Fifth Amendments?[1]

STATEMENT OF THE CASE

Facts

During the hours of darkness on 11 March 1973 somewhere near the San Clemente Border Patrol checkpoint, located midway between San Diego and Los Angeles, Border Patrol Agents Brady and Harkins were sitting in a vehicle observing northbound traffic on Interstate Highway 5. (A.[2] 5-7). Their vehicle was at a ninety-degree angle to the highway with the headlights turned on to shine in the cars that passed. (A. 9). The

[1] This was the principal issue presented by the respondent to the Court of Appeals, No. 73-2161 Brief for Appellant, p. 1. Respondent may urge other distinct grounds in support of the judgment of the Circuit Court of Appeals. *United States v. Ballard*, 322 U.S. 78, 88 (1944). See also Stern and Gressman, *Supreme Court Practice*, 314-315 (4th ed. 1969).

[2] "A." refers to Appendix. "Tr." refers to the Trial Transcript. "R." refers to Clerk's Record or official papers.

officers, observing that the people inside the respondent's car appeared to be of Mexican descent, pursued the respondent's vehicle and stopped it. (A. 7, 9). The sole basis for the stop, according to the agents, was that the occupants appeared to be of Mexican descent. (A. 9). Agent Harkins approached the driver's side, and Agent Brady stood back by the right rear portion of the vehicle to provide protection for Harkins. (A. 7). After Agent Harkins approached the driver, Agent Brady on the righthand side of the car identified himself as an immigration officer and asked the occupants in English their citizenship. Apparently they did not understand. (A. 9). Brady then spoke to the two occupants in Spanish, questioned them as to their citizenship, and asked for but did not receive "papers." (A. 7). Thereafter the respondent standing at the rear of the vehicle with Agent Harkins was given his *Miranda* rights and taken into formal custody along with the passengers. (A. 8).

Trial in the District Court

In the Southern District of California in a two-count indictment, the respondent was charged with the unlawful transportation of two illegal aliens, Elsa Marina Hernandez-Serabia (Count One) and Jose Nunez-Ayala (Count Two) in violation of 8 U.S.C. 1324(a)(2). (R. 1-2). During the jury trial Jose Nunez-Ayala and Elsa Marina Hernandez-Serabia were called as Government witnesses and testified that they were born in Mexico and Guatemala, respectively, and had entered the United States illegally on 11 March 1973 (Tr. 24-27, 57, 63-65). Both gave testimony used by the Government in addition to other statements

attributed to respondent that when the vehicle that respondent was driving was just about to be stopped he said, "Well, they busted us." (Tr. 33-34) or "Here comes the immigration." (Tr. 70, 107). On cross-examination the respondent denied that he made such statements to the aliens. (Tr. 91). Both aliens gave testimony relating to the apparently false immigration papers used to gain entry into the United States. (Tr. 25-26, 64-65). The prosecutor cross-examined the respondent as to the Mexican and American money on his person at the time he was arrested, and the next question of the prosecutor challenged the respondent's statement that he had not been in Mexico since 1970. (Tr. 90). The jury returned a verdict of guilty as to both counts, and the district court sentenced the respondent to a period of four years confinement followed by five years probation. (A. 11-12). The motion to suppress the aliens found in the stop of the respondent's car was heard at the time of trial and denied. (A. 10).

Court of Appeals

On 22 May 1973 an appeal was taken to the United States Court of Appeals for the Ninth Circuit. On 23 October 1973 this case with several other cases relating to *Almeida-Sanchez v. United States*, 213 U.S. 266 (1973), was scheduled for an *en banc* consideration by the thirteen active circuit judges. On 14 June 1974 based upon the decision of this Court in *Almeida-Sanchez* and other well-established precedent, the Court of Appeals, well attuned to the problems of law enforcement in the handling of aliens, *unanimously* reversed the conviction because to justify

a stop there must be at least "founded suspicion." *United States v. Brignoni-Ponce*, 499 F.2d 1109 (9th Cir. 1974). Other *en banc* decisions of that Court relating to stop and searches of vehicles for aliens were *United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974) (checkpoint search); *United States v. Peltier*, 500 F.2d 985 (9th Cir. 1974); (*Almeida-Sanchez:* new rule or old rule), and *United States v. Morgan*, 501 F.2d 1351 (9th Cir. 1974) (search at San Clemente checkpoint not functional equivalent of border). This Court granted certiorari in *Bowen* (No. 73-6848), *Peltier*, (No. 73-2000), and *United States v. Ortiz*, (9th Cir. unpublished memorandum) (checkpoint search) (No. 73-2050). These other opinions were the subjects of substantial divergence of opinion of the circuit judges of the Ninth Circuit, but the stop and interrogation of the respondent without probable cause, founded suspicion, or a warrant of any type was condemned by *all* active circuit judges. The Court of Appeals rejected the Government's overly broad authority of 8 U.S.C. 1357(a)(1) as inconsistent with the well-established demands of the Fourth Amendment's protection of privacy. Although the Ninth Circuit disagreed with the Tenth, *United States v. Bowman*, 487 F.2d 1229 (10th Cir. 1973), it concurred with the District of Columbia Circuit, *Au Yi Lau v. U.S. Immigration and Naturalization Service*, 445 F.2d 217, 223 (D.C.Cir. 1971), *cert. denied* 404 U.S. 864 (1971), which had relied upon the principles of this Court announced in *Terry v. Ohio*, 392 U.S. 1 (1968).

SUMMARY OF ARGUMENT

I.

Border Patrol officers operating a roving patrol 60 miles north of the Mexican-American border absent probable cause to believe a vehicle contains illegal aliens lack authority to forcibly stop a moving vehicle travelling on an interstate highway and to interrogate the occupants.

A. Since 1862 federal legislation regulating the entry of aliens has always manifested a Congressional concern to insure those enforcing immigration laws adhered to the principles of the Fourth Amendment. The "Coolie Trade Act" of 1862 empowered federal officers to "examine" American ships anywhere if they had "reasonable cause" to believe "coolies" were on board. In 1875 the first laws restricting the entry of aliens limited inspection of vessels arriving at the port, if the collector of the port "shall have reason to believe that any such obnoxious persons [prostitutes or convicts] are on board." The Chinese Exclusion Acts not only required a warrant to arrest a person believed to be an illegal Chinese person (Act of 13 Sept. 1888, ch. 1015, sec. 13, 25 Stat. 479) but later required that the arrest warrant have the written approval of the U.S. District Attorney (Act of 3 Mar. 1901, ch. 845, sec. 3, 31 Stat. 1093). In 1891 Congress empowered immigration officers to take testimony from aliens, and in 1917 this authority was expanded to permit immigrant inspectors "to board and search for aliens any. . . vehicle in which they believe aliens are being brought into the United States." Today this language is retained in 8 U.S.C.

1225(a), but in 1925 Congress granted an exemption from a warrant for this power to board and search vehicles. This power to search in context with other warrant exemptions and its own wording is circumscribed and consistent with a requirement of probable cause. In 1946 Congressional amendment to the 1925 warrant exemption for the search of a vehicle added the "reasonable distance" in lieu of the belief that aliens were being brought into the United States. The 1946 amendment must also be construed consistent with the Fourth Amendment, especially since the basic inspection authority (8 U.S.C. 1225(a)) still limits the search to particular vehicles. Although the Attorney General asked for authority to "stop and search" vehicles, Congress adhered to its original language, "board and search." The term "board" does not imply the authority to "stop," and there is no express Congressional grant of authority to immigration officers to interdict highway traffic. The legislative history of the section 235(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1225(a), manifests a Congressional concern to limit at the port of entry indiscriminate questioning of citizens, which would be much less warranted on an interior interstate highway. Where the agents thought the occupants to be of Mexican descent, there was not even minimal compliance with the statute that the person to be interrogated be a "person believed to be an alien," because there are too many American citizens of apparent Mexican descent in Southern California to create a justifiable nexus to alienage.

B. Although the stop of respondent's vehicle was a "seizure" under *Terry v. Ohio*, 392 U.S. 1 (1968), the

border patrol officers had no objective articulable facts to justify this forcible intrusion. Hunches of officers, especially on racial or ethnic lines, are insufficient. Although a stop of a person on a street based on a reasonable belief that criminal activity is underfoot (founded suspicion) may be justified, a stop of a moving vehicle on a highway requires probable cause.

C. The concept of area-wide probable cause, especially without a warrant, is inapplicable.

1. The "area-wide equivalent of probable cause" does not, without more, automatically arise in an amorphous zone known as "the area of the Mexican border." *Camara v. Municipal Court*, 387 U.S. 523 (1967), is not comparable, and even assuming that some form of area-wide probable cause might be found, that requirement would need much greater specificity than "the area of the Mexican border."

2. *Camara* requires that where closely regulated area-wide probable cause is applicable, a warrant must be obtained in advance of the intrusion or inspection. The intervention of a neutral judicial officer is necessarily consistent with the Fourth Amendment. The rare situations where neither probable cause nor a warrant are necessary are strictly limited to emergency situations. If a warrant is a prerequisite for health or fire inspection of buildings, then it would be necessary for forcible stops of the travelling public on the highway for interrogation.

D. The alien witnesses, themselves, and their testimony were used against the respondent. The Fourth Amendment excludes verbal evidence as well as physical evidence. Since the respondent's vehicle was stopped, he had standing to object to the result of the unlawful intrusion.

E. *Carroll v. United States*, 267 U.S. 132 (1925), has been consistently followed by this Court so that the result here is not a 'new rule." This case involving the application of 8 U.S.C. 1357(a)(1) was one of first impression for the Ninth Circuit which adhered to its earlier precedents requiring at least "founded suspicion" for such a stop.

II.

The only articulated basis for this vehicle stop was that the occupants appeared to be of Mexican descent. The right to travel on the highways without interference from federal officers is a fundamental right of constitutional proportions. Persons of Mexican descent constitute an identifiable group who when subject to invidious discrimination are entitled to equal protection of the laws.

Discrimination on a racial or national basis is prohibited by the Fifth Amendment. Even though the power may be proper on its face, its application against a certain group may be unconstitutional. Distinctions based on "ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Invidious discrimination by

officers constitutes a defense to the criminal action, and the fruits of the improper stop must be suppressed.

ARGUMENT

I.

ABSENT A WARRANT BORDER PATROL OFFICERS MUST HAVE PROBABLE CAUSE TO FORCIBLY STOP A VEHICLE TRAVELLING ON AN INTERIOR HIGHWAY AND TO INTERROGATE THE OCCUPANTS OF THE VEHICLE.

A. The history of legislation regarding Immigration officer powers does not establish a Congressional abandonment of the requirement of probable cause to forcibly stop a vehicle on an inland highway to conduct an interrogation concerning alienage.

The first federal legislation regulating entry of aliens was the prohibition on the "Coolie Trade" by American citizens in American vessels. Act of 19 Feb. 1862, ch. 27, 12 Stat. 340.[3] These Congressional prohibitions were not so much directed against the Chinese "coolies" as against those who would transport in ships these oriental servants involuntarily held in service or labor. Under Section 6 of the Act of 19 Feb. 1862, ch.

[3] Although this legislation is of ancient origin, it was only recently repealed. Public Law 93-461; 88 Stat. 1387 (20 October 1974).

27, 12 Stat. 341, the President was authorized and empowered:

> "to direct and order the vessels of the United States, and the masters and commanders thereof, to *examine* all vessels navigated or owned in whole or in part by citizens of the United States, and registered, enrolled, or licensed under the laws of the United States, wherever they may be, whenever, in the judgment of such master or commanding officer thereof, *reasonable cause shall exist to believe that such vessel has on board, in violation of the provisions of this Act, any subjects of China known as 'coolies' for the purpose of transportation. . . .*" (Emphasis Added).

Although it might be contended that the power of the United States was sufficient at certain times and places (i.e. at the time of arrival at the port of entry) to examine all vessels, this Congressional authorization empowered federal officers to examine American ships at *any place* but such power was expressly limited to the requirement of reasonable or probable cause to believe that the "coolies" were on board the vessel. The same section appears as section 2163, *Revised Statutes of the United States* (1878 2d ed.) and directed that the examining officer have:

> *"reasonable cause . . . to believe that such vessel has on board any subjects of China, Japan or other oriental country, known as 'coolies'. . . ."* 18 Stat. 377. (Emphasis added).

This section constitutes one of the seven sections (sections 2158-2164) that serve as the first known compilation of the laws relating to Immigration, Title XXIX *Revised Statutes of the United States*, (1878 2d ed.).

The first federal laws restricting entry of the immigrants themselves were promulgated in 1875. Act of 3 Mar. 1875, ch. 141, 18 Stat. 477; see *Kleindienst v. Mandel*, 408 U.S. 753, 761 (1972). The 1875 law prohibited the entry of women for purposes of prostitution or persons convicted of felonious crimes other than political offenses. Again the power to search vessels was restricted:

> "Every vessel arriving in the United States may be inspected under the direction of the collector of the port at which it arrives, *if he shall have reason to believe that any such obnoxious persons [prostitutes or convicts] are on board. . . .*" Act of 3 Mar. 1875, ch. 141, sec. 5, 18 Stat. 477. (Emphasis Added).

The clear intent of the legislation was to empower officers at the port of entry to conduct limited searches for the purpose of excluding designated classes of aliens. By the Act of 3 Aug. 1882, ch. 376, sec. 2, 22 Stat. 214, authorization to board ships arriving at a port of entry was expanded as to the categories of persons to be excluded and granted the power of examination of those on ship. This law provided: "And if on such examination there shall be found among such passengers any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge . . ., and such person shall not be permitted to land." 22 Stat. 214.

Although the Chinese Exclusion Acts initiated in 1882 were not a model of legislation for the "land of opportunity,"[4] these laws contained express statutory

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[4] Repealed by Act of 17 Dec. 1943, c. 344, 57 Stat. 600. See also note 25, *infra*.

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tions on the apprehension of those who might be Chinese. These laws set forth the tone of true ressional concern for the rights of those who might spected of being illegal aliens. The procedure for rrest of such person was spelled out with ularity:

> "That any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its Territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of the United States court, or before any United States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came." Act of 13 Sept. 1888, ch. 1015, sec. 13, 25 Stat. 479.

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rrest could be made only after proper issuance of rrant. Congress later provided additional protec-

> "That no warrant of arrest for violations of Chinese-exclusion laws shall be issued by United States commissioners excepting upon the sworn complaint of a United States district attorney, assistant United States district attorney, collector, deputy collector, or inspector of customs, immigration inspector, United States marshal, or deputy United States marshal, or Chinese inspector, *unless the issuing of such warrant of arrest shall be first approved or requested in writing by the United States district attorney of the district in which*

issued." Act of 3 Mar. 1901, ch. 845, sec. 3, 31 Stat. 1093. (Emphasis added).

Even the formal requirement of a warrant for arrest was further restricted by the additional condition precedent of written approval of the chief federal prosecutor of the district.

In 1891 the first Congressional authorization was passed outlining the powers of immigration inspection officers to inspect alien immigrants at the time of their arrival. Act of 3 Mar. 1891, ch. 551, sec. 8, 26 Stat. 1085. Section 8 provided: "The inspection officers and their assistants shall have power to administer oaths, and to take and consider testimony touching the right of any such aliens to enter the United States, all of which shall be entered of record." 26 Stat. 1085. In 1903 the authority of these immigration officers was expanded:

> "Immigration officers shall have power to administer oaths and to take and consider testimony touching the right of any alien to enter the United States, and, where such action may be necessary, to make a written record of such testimony, and any person to whom such an oath has been administered under the provisions of this Act who shall knowingly or willfully give false testimony or swear to any false statement in any way affecting or in relation to the right of an alien to admission to the United States shall be deemed guilty of perjury and be punished as provided by section fifty-three hundred and ninety-two, United States Revised Statutes." Act of 3 Mar. 1903, ch. 1012, sec. 24, 32 Stat. 1219.

In 1907 this authority was included in a general revision of the immigration laws. Act of 20 Feb. 1907,

ch. 1134, sec. 24, 34 Stat. 906. The same statute even announced that the entry and inspection of aliens along the borders of Canada and Mexico were to be conducted "so as not to unnecessarily delay, impede, or annoy passengers in ordinary travel between the United States and said countries. . . ." Act of 20 Feb. 1907, ch. 1034, sec. 32, 34 Stat. 908. If Congress was then concerned about the fair and unobtrusive contacts of immigration officers at the border, *a fortiori* its concern would be greater for such forcible stops and interrogations over sixty miles from the border.

The general revision of immigration laws in 1917 announced for the first time the right of immigration officers to board and search vessels and vehicles:

> "Immigrant inspectors are hereby authorized and empowered to board and search for aliens any vessel, railway, car, or any other conveyance, or *vehicle in which they believe aliens are being brought into the United States.* Said inspector shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter, re-enter, pass through, or reside in the United States. . . ." Act of 5 Feb. 1917, ch. 29, sec. 16, 39 Stat. 886.[5] (Emphasis added).

In 1925 Congress in an appropriation bill granted immigration officers the power to arrest and search without warrant. Act of 27 Feb. 1925, ch. 364, 43 Stat. 1049-1050. Although Congress excused the requirement of a warrant, the powers to arrest and search were carefully circumscribed:

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[5] As Justice White noted in his dissent in *Almeida-Sanchez*, 413 U.S. 266, 292, this Congressional authorization *and limitation* still exists today as 8 U.S.C. 1225(a). (Sec. 235(a) of the Immigration and Nationality Act of 1952).

"*Provided further,* That hereafter any employee of the Bureau of Immigration authorized so to do under regulations prescribed by the Commissioner General of Immigration with the approval of the Secretary of Labor, shall have power without warrant (1) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission of aliens, and to take such alien immediately for examination before an immigrant inspector or other official having authority to examine aliens as to their right to admission to the United States, and (2) to board and search for aliens any vessel within the territorial waters of the United States, railway car, conveyance, or vehicle *in which he believes aliens are being brought in to the United States;* and such employee shall have power to execute any warrant or other process issued by any officer under any law regulating the admission, exclusion, or expulsion of aliens." 43 Stat. 1049-1050. (Emphasis added).

The power to arrest or take into custody aliens without warrant is limited to violations occurring in the immigration officer's presence or view. This is far more restrictive than the standard authority today granted to federal law enforcement officers to arrest persons for any federal offense committed in their presence or where reasonable cause exists to believe a person has committed a federal felony.[6] The essence of the right

[6] For example, FBI agents today have power to arrest for any federal offense committed in their presence or any federal felony if the agents "have reasonable grounds to believe that the person to be arrested has committed or is committing such felony." 18 U.S.C. 3052.

of immigration officers to forcibly stop vehicles arises out of subsection (2) which permits the boarding and searching for aliens of any vehicle "in which he believes aliens are being brought into the United States." The legislative language clearly suggests that the immigration officers must have a "belief" that aliens are being illegally introduced *into* the United States, which, of necessity, connotes activities at or in the immediate vicinity of an international border. Together subsections (1) and (2), the exceptions excusing a warrant having been so carefully constricted, emphasize the need for immigration officers to secure a warrant in all other circumstances. Again, Congress had anticipated this Court's emphasis on the need for a warrant. *Terry v. Ohio,* 392 U.S. 1, 20 (1968). This last provision of the above cited statute empowered immigration officers to execute "any warrant or other process" which would be necessary in the fair enforcement of the immigration laws. Congress had thus enacted legislation consistent with the Fourth Amendment and the decision of *Carroll v. United States,* 267 U.S. 132 (1925), decided in the same year.

The 1946 amendment, with a dearth of legislative history other than the apparently unopposed request of the Attorney General, modified and expanded the 1925 legislation:

> "Any employee of the Immigration and Naturalization Service authorized so to do under regulations prescribed by the Commissioner of Immigration and Naturalization with the approval of the Attorney General, shall have power without warrant (1) to arrest any alien who in his presence or view is entering or attempting to enter the

United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or any alien who is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the person arrested shall be taken without unnecessary delay for examination before an officer of the Immigration and Naturalization Service having authority to examine aliens as to their right to enter or remain in the United States; (2) to board and search for aliens any vessel within the territorial waters of the United States, railway car, aircraft, conveyance, or vehicle, within a reasonable distance from any external boundary of the United States; and (3) to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, or expulsion of aliens, if the person making the arrest has reason to believe that the person so arrested is guilty of such felony and if there is likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be taken without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States; and such employee shall have power to execute any warrant or other process issued by any officer under any law regulating the admission, exclusion, or expulsion of aliens."[7] Act of 7 Aug. 1946, ch. 768, 60 Stat. 865.

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[7]It is anomolous that the Executive (Commissioner and Attorney General) could adopt regulations excusing a warrant leading to a criminal prosecution, when he does not have power to such issue warrants. *Mancusi v. De Forte*, 392 U.S. 364, 371 (1968).

Subsection 1 concerning the power of arrest without a warrant is expanded to "any alien who is in the United States in violation of any such law or regulation." However, the power to arrest is limited to a situation where the alien is likely to escape before a warrant can be obtained for his arrest. Again the Congressional emphasis was placed on a warrant requirement even if an immigration officer had probable cause to believe that the alien was in violation of immigration laws. Subsection (2) is substantially altered. In 1925, the right to board and search the vehicle anywhere in the United States was limited to the vehicle "in which he [the immigration officer] believes aliens are being brought into the United States." The 1946 amendment deletes that requirement and substitutes "within a reasonable distance from any external boundaries of the United States." This legislative amendment can be construed consistent with the Fourth Amendment or taken as a blanket and unlimited authority of the Immigration and Naturalization Service to prescribe regulations that would make legal searches any place within the United States "within a reasonable distance from any external boundary of the United States." This statute has now been construed to be consistent with the Fourth Amendment in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

Almeida-Sanchez was consistent with the previous Congressional legislation and its historical precedents. The 1925 restriction on the right to board and search vehicles in the United States by its express language established as condition precedent to such boarding and searching that there exist probable cause that aliens were being illegally introduced into this country. This

requirement would indicate that the knowledge could only be derived by immigration officers at or in the immediate vicinity of the border. The 1946 limitation attains harmony with the Fourth Amendment if Congress, in excusing the probable cause requirement, carefully limited such authority to areas so immediate to the boundary line that a connection may be shown with a border crossing. "Reasonable distance" can vary with any interpretation,[8] and this Court in *Almeida-Sanchez* furnished flexibility with the concept of "functional equivalents" of the border where probable cause was not necessary in an area near and connected with the border. 413 U.S. 266, 273.

Justice Powell in his concurring opinion discussed the possibility of a warrant based upon the functional equivalent of probable cause at areas near the border. 413 U.S. 266, 283-285. Such interpretations permit border searches at places within the interior without probable cause, and "reasonable distance" could then

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[8]The implementing immigration regulation states that reasonable distance "means within one hundred air miles from the external boundary of the United States or any shorter distance" (8 C.F.R. 287.1(a)(2)). That same regulation also provides that the I.N.S. Commissioner may declare a distance in excess of one hundred miles to be reasonable (8 C.F.R. 287.1(b)). The creation of such an unrestrained authority is surely inconsistent with the general scheme of Congressional regulation which carefully circumscribed the power to arrest without warrant for violation of the immigration laws (subsection (1) and the power to arrest without warrant for felonies (subsection (3). Congress conditioned those powers upon the common law requirement of probable cause *and* the additional requirement that there be a "likelihood of the person escaping before a warrant can be obtained for his arrest."

be construed to co-extend with those situations. The Congressional language is given effect, and the Fourth Amendment is not violated.

The legislative history of the 1946 amendment concerning the broadening of the power of immigration officers to board and search vehicles is contained in one sentence of a letter of Attorney General Francis Biddle dated 10 February 1945 to the Chairman, Committee on Immigration and Naturalization which stated:

> "In the enforcement of the immigration laws it is at times desirable *to stop and search* vehicles within a reasonable distance from the boundaries of the United States *and the legal right to do so should be conferred by law.*" H.R.Rep. No. 186, 79th Cong., 1st Sess. 2 (1945).[9] (Emphasis added).

The statutory language continues the reference to "board and search," notwithstanding the Attorney General requested the power to "stop and search vehicles." The concept of boarding a vehicle inherently implies the absence of motion.[10] Where there exists an inconsistency between the desired intent of the Attorney General and the language used by Congress, the plain wording of Congress should control. Although a technical distinction can be made between "boarding" and "stopping," the most important consideration is that Congress did not confer upon Border Patrol agents

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[9] 1946 U.S. Code Cong. Service, 1414-1415.

[10] *Websters New World Dictionary of American Language* (2d College ed. 1972) defined the verb "board" "to get on (a train, bus, etc.)." The historical reference to coming along side a ship to board with a hostile purpose does not appear applicable to a vehicle.

the power to stop moving vehicles well within the United States.

This legislation again reveals the very limited context in which Congress permitted these carefully circumscribed invasions of privacy of an individual without a warrant. In light of the general scheme, it is difficult to argue for such open-ended powers now requested by the petitioner.

The Immigration and Nationality Act of 1952 (66 Stat. 163) was a comprehensive revision of the Immigration, Naturalization, and Nationality Codes. Although the petitioner places the emphasis of immigration officers' right to stop and interrogate under section 287(a) (8 U.S.C. 1357(a)), the basic authorization for inspection by immigration officers is in section 235(a) (8 U.S.C. 1225(a)).[11] This now controlling statute, section 235(a), also empowers immigration officers to board and search vehicles, but it is restricted

[11]Section 235(a) provides in part: "Immigration officers are hereby authorized and empowered to board and search any vessel, aircraft, railway car, or other conveyance, or vehicle in which they believe aliens are being brought into the United States. The Attorney General and any immigration officer, including special inquiry officers, shall have the power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this Act and administration of the Service, and, where such action may be necessary, to make a written record of such evidence." 66 Stat. 198-199. This section continues to today the inspection authority Congress granted in 1891 *supra*. Cf. *Almeida-Sanchez*, dissenting opinion of Justice White, 413 U.S. 266, 292.

by the requirement that these officers possess the personal belief that aliens are being brought into the United States. The statutory language requires direct or indirect personal knowledge of immigration officers that aliens are in the process of being brought into the United States. The phrase "being brought into the United States" requires proximity to the border or a functional equivalent and a basis of belief by immigration officers as to particular vehicles. The legislative history, H.R.Rep. 1365, 14 Feb. 1952, in the analysis of the 1952 legislation consolidates section 235 (Chapter 4) and section 287. Concerning the authority to question under section 235, the House Report states:

> "Any person coming to the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain, whether or not he intends to remain permanently, whether, if an alien, he intends to become a citizen, and such other information as will aid the immigration officers in determining whether the person is a national of the United States or an alien, and, if the latter, whether he is subject to exclusion under any of the provisions of the bill. *It is not intended by this provision to sanction the indiscriminate questioning or harrassment of citizens returning to the United States, but it is to be used by the immigration officers whenever there is reason to believe that the citizen is violating or about to violate the law and is about to become expatriated.*[12] (Emphasis added).

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[12]H.R. Rep. 1365, 82d Cong. 2d Sess. 54-55 (1952); 1952 U.S. Cong. and Adm. News, 1709-1710. The earlier Senate Report on the same provision declared: "In conjunction with their inspection of aliens, the bill authorizes the immigration

If the right to question at the border was intended to be so narrowly circumscribed to a situation where immigration officers were to have probable cause to believe that the person was violating or about to violate the law, with how much greater force does such a requirement exist at a substantial distance from the border on a heavily travelled highway?[13]

When section 287(a) and section 235(a) are compared, there is some overlap. Section 235(a) provides the general authorization which is the principal power allotted to immigration officers to inspect persons who might be aliens and is the basic citation of authority. Although the section 287(a) exceptions to the requirement for a warrant are enumerated, they cannot be logically construed to be the basis of an unlimited power to interrogate any person anywhere in the United States.

Section 287(a)(1), 8 U.S.C. 1357(a)(1), provides:

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officers to board and search vessels, aircraft, railway cars or any other conveyance or vehicle in which they believe aliens are being brought into the United States. Under similar language in S. 716, immigration officers would be empowered to search such conveyances in which they believe or suspect aliens are being brought into the United States, but since some question was raised as to the effect of the word "suspect," it has been eliminated in the bill. *However, the change is not intended to restrict or limit in any way the existing authority of appropriate immigration officers to conduct such searches upon the basis of probable cause.*" S. Rep. 1137, 82d Cong. 2d Sess. 27 (1952). (Emphasis added).

[13]In the same analysis there is only a brief general reference to section 287. H.R.Rep. 1365, 82d Cong. 2d Sess. 55 (1952); 1952 U.S. Cong. and Adm. News, 1710.

> "To interrogate any alien or person believed to be an alien as to his right to be or remain in the United States."

The statute excuses the requirement of a warrant for such interrogation if there exists a justifiable basis for interrogation. The petitioner contends that this statute permits questioning of any person *any place* and further that it permits the interdiction of traffic to accomplish this result despite the statute's lack of reference to the authority of immigration officers "to forcibly stop traffic" so as to interrogate occupants of vehicles travelling within the interior of the United States. This statutory authorization is further restricted to questioning of "aliens" (implying actual knowledge) or "person believed to be an alien" (Implying probable cause). Respondent submits that this statute when read in conjunction with *Carroll and Almeida-Sanchez*, absent a warrant, requires that the immigration officer have probable cause to believe that an occupant of a vehicle is an illegal alien before he has the authority to stop it and question the occupant. In this case, the immigration officer, believing the occupants appeared to be of Mexican descent, did not have probable cause or founded suspicion to believe that these persons were aliens. There are too many American citizens of Mexican descent in Southern California to give any credence to such claim. *United States v. Mallides*, 473 F.2d 859, 860 (9th Cir. 1973).

B. Terry v. Ohio, 392 U.S. 1 (1968), does not authorize, in the absence of probable cause, a warrantless forcible stop of an automobile travelling on a highway a substantial distance from the border.

The vehicle of the respondent was forcibly stopped on an interstate highway over 60 miles from the Mexican border and the occupants interrogated by armed Border Patrol agents because they believed these people appeared of Mexican descent. The regularly established checkpoint was closed, and the Border Patrol officers pursued and stopped the vehicle of respondent during the hours of darkness. When the stop was made, one officer took a position to provide protection to the other. (A. 7).

This stop on the highway was a "seizure" of the vehicle and the occupants therein within the meaning of the Fourth Amendment.[14] *Henry v. United States*, 361 U.S. 98, 103 (1959) (a car travelling on a street in Chicago); *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (a person walking down the street in Cleveland). This Court in *Terry, supra*, held: "It must be recognized that whenever a police officer accosts an individual and

[14]The reference to a so-called "automobile exception" has been in terms of excusing the *warrant* requirement, cf. *Cardwell v. Lewis*, 417 U.S. 583, 589-590, 597 (1974), but this Court has held that nothing less than probable cause is necessary to stop a vehicle. *Carroll v. United States*, 267 U.S. 132, 153-154 (1925); *Henry v. United States*, 361 U.S. 98, 104 (1959); *Almeida-Sanchez v. United States* 413 U.S. 266, 272, 274-275. Justice Powell's concurring opinion in which he joined the majority did suggest the possibility of something less than probable cause but then only pursuant to a warrant. 413 U.S. 266, 277-285.

restrains his freedom to walk away, he has 'seized' that person." 392 U.S. 1, 16; and further stated: "We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search.'" 392 U.S. 1, 19. The person driving an automobile on an interstate highway has an expected right of uninterrupted freedom of movement and the right to be let alone.

Both fundamental rights are protected by the Fourth Amendment. The Government must justify its interference. It did not do so. Although this Court in *Terry, supra,* permitted the intrusion to stop an individual on the street upon something less than probable cause, the Court required an *objective* standard based upon articulable facts that could be later presented to a neutral judge to assure that the intrusion was reasonable under its peculiar circumstances. Chief Justice Warren speaking for the Court in *Terry* stated:

> "And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts

> available to the officer at the moment of seizure or the search 'warrant a man of reasonable caution in the belief' that the action was appropriate?"[15] 392 U.S. 1, 21-22.

Although less than probable cause might be enough in some circumstances, the particular intrusion must be justified by specific factual circumstances. The Court especially eschewed stops based upon hunches or unfair generalizations:

> "Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more than inarticulate hunches, a result this Court has consistently refused to sanction."[16] 392 U.S. 1, 22.

The experienced police officer's studied observations of three men believed to be "casing" a downtown store for an armed robbery justified the stop for further inquiry in *Terry*.[17] The Border Patrol officers had less

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[15]The Court also described the basis for the stop as "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." 392 U.S. 1, 30. (Emphasis added).

[16]*See also* 392 U.S. 1, 27.

[17]The facts in *Terry* did not formally resolve the issue of the officer's right to interrogate the suspect, even though Justice White in his concurring opinion states that questioning would be appropriate but the suspect need not answer or be commpelled to answer. 392 U.S. 1, 33-34. If the Border Patrol officer can compel the stop, then some admonition by the officer is necessary to apprise the occupants that he could not compel them to talk. Advice of rights should not be limited to a formal arrest, cf. 8 C.F.R. 287.3, but given where there is deprivation of a freedom of action in a significant way. *Miranda v. Arizona*, 384 U.S. 436, 477 (1966).

than a hunch, a racial or ethnic bias, to support their stop of respondent's vehicle. The Court of Appeals consistent with its own precedent[18] adhered to the teachings of *Terry* and required that the Border Patrol agents who before they stop a vehicle must "possess facts" which constituted a founded suspicion that he or his passengers were illegal aliens. 499 F.2d 1109, 1112.[19] The holding and reasoning of *Terry*,[20] which was interruption of the movement of a person on a street, supports the conclusion of the Court of Appeals; however, the respondent submits that when federal officers seek to stop a moving vehicle on the highway, especially by a roving patrol, probable cause is required

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[18] *Wilson v. Porter*, 361 F.2d 412 (9th Cir. 1966).

[19] The respondent contends that under *Carroll* and its progeny through *Almeida-Sanchez*, a stop must be based upon not less than probable cause, especially in light of the legislative history designed to prevent harrassment by immigration officers. See 1952 *Cong. & Adm. News* 1709-1710, n. 12 *supra* pp. 23-24). To sustain the position of the Court of Appeals, that issue need not be reached.

[20] *Adams v. Williams*, 407 U.S. 143 (1972), is consistent with the founded suspicion rationale and held: "A brief stop of a *suspicious* individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the *facts* known to the officer at the time." 407 U.S. 143, 146. It should be noted that in *Adams* it was a parked car which did not require the interruption of moving motor vehicle traffic. Also in *Terry* the intrusion of an on-the-street encounter in public is less burdensome than the stopping and pulling of a vehicle off the highway.

for such stop. The Court of Appeals unanimously held that a lesser standard of "founded suspicion" was necessary but lacking. Although probable cause is and should be the standard for such a stop, the failure of the Government to satisfy even the lesser standard serves to sustain the action of the Court of Appeals.

C. The roving Border Patrol stop of vehicle on a major highway over sixty miles from the Mexican border cannot be justified under the concept of "area-wide equivalent of probable cause," especially in the absence of a warrant.

1. The area-wide equivalent of probable cause does not justify stops in the area of the Mexican border.

The petitioner questions but does not dispute the stop as a roving patrol stop (Brief for Pet. 8, n.3), as found by the decision of a *unanimous en banc* Court of Appeals. 499 F.2d 1109, 1110. This Court always gives great weight to the factual determinations of a Court of Appeals familiar with the problem peculiar to its jurisdiction. *Cf. Hamling v. United States*, 418 U.S. 87 (1974). Since the checkpoint was not operational, these Border Patrol officers reverted to the type of patrol expressly condemned in *Almeida-Sanchez*.

There was neither probable cause for the stop,[21] nor a warrant to authorize the roving patrol. Faced with

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[21] Also, the Government does not contend there was "founded suspicion" or "reasonable factual circumstances" for the stop.

these facts, the petitioner is forced, of necessity, to propose an innovational exception to the well-established requirements of the Fourth Amendment regulating the activities of law enforcement officers in the seizure of persons and automobiles.

The "area-wide equivalent of probable cause" proposed by the Government is not defined, but referred to generically as "in the area of the Mexican border." (Brief for Pet. 9, 13, 21). The ambiguity of the term implies an unrestrained, and in this case undefinable, power in the hands of federal officers that the Fourth Amendment was adopted to eliminate.[22]

The Government's reliance on *Camara v. Municipal Court*, 387 U.S. 523 (1967), is misplaced.[23] In evaluating the application of *Camara* to this case, the following factors should be considered: (1) the purpose of the intrusion, (2) the nature of the intrusion, (3) the area covered, (4) the number of persons affected, (5) the legislative or administrative safeguards, (6) the history of the practice, (7) other alternatives, and (8)

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[22]Speaking to the authority to search a commercial warehouse, this Court in a similar vein stated, "But the decision to enter and inspect will not be the product of the unreviewed discretion of the enforcement officer in the field." *See v. City of Seattle*, 387 U.S. 541, 545 (1967).

[23]The respondent recognizes that five members of this Court rejected in *Almeida-Sanchez* a similar Government-suggested non-warrant application of *Camara* (413 U.S. 266, 270, 277-285) as well as the Government's reliance on the detailed statutory regulation of business cases, *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), and *United States v. Biswell*, 406 U.S. 311 (1972) (413 U.S. 266, 270-271, 280-281), but presents additional reasons why the Government's reliance on *Camara* is inappropriate.

the procedure as criminal or administrative. Most of these points are treated or referred to in *Camara* or its companion case of *See v. City of Seattle*, 387 U.S. 541 (1967).

(1) The purpose of the ordinance in *Camara* was to enforce health regulations and in *See* to enforce fire inspection regulations. The purpose of the immigration roving patrol stops and inspections is to arrest and prosecute those transporting illegal aliens into the United States. *Camara* and *See* belong in a category of the first order of society's fundamental right of self-preservation,[24] whereas the influx of people from foreign countries, not regulated prior to 1862, is not inherently hazardous to a community or state.[25] For example, certain illegal aliens with familial ties in the United States have a defense to deportation. Cf. 8 U.S.C. 1251(f). (2) The nature of the intrusion is significant where the officers at their whim may curb a moving vehicle or demand the occupants account for

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[24] See dissenting opinion of Justice Clark to *Camara* and *See*, 387 U.S. 541, 546-555.

[25] The Statue of Liberty dedicated in 1886 contained an invitation to exiles from other lands:

> "Give me your tired, your poor,
> Your huddled masses, yearning to breathe free,
> The wretched refuse of your teeming shore.
> Send these, the homeless, tempest-tost to me,
> I lift my lamp beside the Golden Door!"
> (Emma Lazarus, "The New Colossus.")

Efforts of society against sickness and poverty should not be limited to aliens. Any threat to the employment opportunities of citizens is best answered by laws proscribing employment of illegal aliens. See *United States v. Ortiz*, No. 73-2050, Brief for Resp. 34-35.

their right to be in the United States.[26] Authority to inspect buildings is of a much lower order. (3) *Camara* and *See* involved periodic inspections within a city, but here the Government seeks justification for its practice "in the area of the Mexican border." In *Camara* and *See*, the Court had also spoke in terms of more limited areas as the subject matter of search warrant. (4) Property owners within a designated city, much like the business proprietors in *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), and *United States v. Biswell*, 406 U.S. 311 (1972), are a limited group fixed in location, but in the instant case, the Government seeks authority to regulate all highway traffic in the area of the Mexican border.[27] (5) *Camara* referred to "reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling," 387 U.S. 523, 538, but no such specific limitations have been announced for immigration officers. Congress has passed no legislation to stop traffic. The power to interrogate aliens is

[26]The American born, Spanish speaking, citizen might find it difficult to prove his citizenship. The INS estimate of a stop for questioning at a checkpoint at "no more than about 5 seconds per occupant" (Brief for Pet. 25) is inconsistent with senior Border Patrol Agents in the field who state that the average car is detained for questioning "approximately three to five minutes." *United States v. Ortiz*, No. 73-2050, Brief for Resp. Appendix p. 5a. The duration is solely within the power of the officer.

[27]Near where respondent was stopped, it has been estimated that 10,000,000 vehicles (and certainly more than that number of people) pass the checkpoint annually. See *United States v. Ortiz*, No. 73-2050, Brief for Resp. 13, n. 4.

recognized, but it cannot be argued that Congress left totally unfettered the right of the immigration officer to interrogate a person he subjectively believes to be an alien. 8 U.S.C. 1357(a)(1). The Congressional requirement for a belief that the person is an alien is more properly consistent with the requirement of probable cause. Such interrogations must be supported by objective articulable facts that would lead a prudent immigration officer to believe that the person was an alien and violating the law.[28] (6) Although the right of cities to protect their health and safety has been recognized since time immemorial, the questionable immigration practice of stopping vehicles was initiated in 1927 but operated without statutory or court approval. In 1946 the Attorney General requested the power "to stop," but the Congress adhered to its previous standard limited "to board." This practice received no public acceptance and was contrary to the legal principle announced in *Carroll*. (7) It is practically impossible to check for fire or health hazards without an inspection of buildings, but alienage can be determined at any point the alleged alien has regular contacts with business or governmental activities involving registration, i.e. driving, owning a vehicle, attending school, voting, receiving welfare or unemployment benefits, marrying, and working in the government employ.[29] (8) A key aspect of *Camara* in

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[28]This suggestion is similar to the one set out in the legislative history for interrogations *at the border*. 1952 U.S. Cong. and Adm. News 1710; H.R.Rep. 1365, 82d Cong. 2d Sess. 55 (1952).

[29]See *United States v. Ortiz*, No. 73-2050, Brief for Resp. 31-35 for additional alternatives and suggestions for detection and proper disposition of illegal aliens.

permitting something less than traditional notions of probable cause to justify the intrusion was the fact that these officers were not searching for evidence of criminal action, 387 U.S. 523, 530. This is precisely the object of immigration officers' searches–illegal entrant aliens punishable under 8 U.S.C. 1325[30] or persons unlawfully transporting them subject to a penalty of five years confinement or $2,000 fine, or both, for each alien. 8 U.S.C. 1324.[31] The characterization by Justice Powell (413 U.S. 266, 278, 279) that both *Camara* and alien invasions of privacy produce "evidence of crime" should permit the distinction that *Camara*-type penalties were minor, i.e. petty offenses. The Government's self-serving claim that only 3% of the illegal aliens apprehended are prosecuted is no effective answer, because the Government would then exclusively control the ability to determine whether their conduct is criminal or administrative. The best answer is that Border Patrol officers are armed; health and fire inspectors are not.[32]

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[30]A second offender for the simple act of illegal entry is subject to a felony penalty: two years imprisonment or $1,000 fine, or both. 8 U.S.C. 1325.

[31]Although the INS is justifiably proud of its work in stemming the flow of drugs, see *United States v. Ortiz*, No. 73-2050, Brief for Resp. 29-30, like the customs officers within the interior of the United States they should possess facts amounting to probable cause to justify the stop of a vehicle moving on the highway. The restriction of the customs officers may create a potential for abuse by immigration officers.

[32]Another factual distinction is that there appeared to be "reasonable factual circumstances" or "founded suspicion" for the actions taken in *Camara* (improper residential use of ground floor, 387 U.S. 523, 527) and in *See* (living quarters in a locked warehouse, 387 U.S. 541, 549).

The transparency of the Government's argument regarding area-wide equivalent of probable cause is discernible through its clearly arbitrary application. It is supposed to be applicable "in the area of the Mexican border" but might not be applicable in New York City (Pet. Brief 16 n. 7, 20-21). The statute says "reasonable distance," 18 U.S.C. 1357(a)(3), and the regulation defines this term as "100 air miles," 8 C.F.R. 287.1(a)(2), with a provision that the INS Commissioner may exceed the 100-mile limit.[33] Although this language is overly broad, it may be strictly construed so as not to transgress the prohibitions of the Fourth Amendment. The application of such a novel concept of the Executive defining an area as the functional equivalent of probable cause poses a serious threat to the principle of equal protection of the law. Persons living in San Diego and Tucson are entitled to no less invasion of their rights than the people of New York and Boston.[34]

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[33]Although the petitioner has not limited "the area of the Mexican border," it is implied that the 100-mile limitation would be applicable.

[34]The Fourth Amendment was a response to the infamous writ of assistance. *Boyd v. United States*, 116 U.S. 616, 624-627 (1886). Ironically, the British writ requesting the authority to search for imported contraband limited its authority to the port of Boston. Gray, *Writs of Assistance*, appendix I, Quincy's Massachusetts Reports, pp. 404-405. Even today New York City is subject to INS "sweeps," which are stops for interrogation of persons concerning their right to be in the United States without warrant or probable cause. An INS memo on New York "sweeps" suggests that agents stop people if they have certain speech patterns, wear serapes, carry brown lunch bags, or other characteristics intuitively created by the agents. *Hearings Before the Subcommittee on Immigration, Citizenship, and International Law of the Committee of the Judiciary*, H.R., 93d Cong. 1st Sess., 32-35 (26 July 1973).

2. Without probable cause a warrant cannot be excused.

The thrust of *Camara*, even permitting "something less than probable cause" for an area inspection, subjugated such invasion of privacy to the requirement of a warrant. The suggestion by the Government that the area-wide equivalent of probable cause is sufficient absent advance judicial approval through the warrant procedure unduly stretches the dual requirement of both probable cause and a search warrant.

Assuming arguendo that the Government has established the area-wide probable cause for stops and interrogations, the Government, in the face of *Almeida-Sanchez*,[35] but with some support of the dissenting opinion[36] and the concurring opinion of Justice Powell,[37] again contends that neither a warrant nor probable cause are required. The elimination of either of these requirements should be exceptional, otherwise the exceptions swallow the rule.

The language giving rise to this contention arose in *Camara*, where the Court stated: "Since our holding emphasizes the controlling standard of reasonableness, nothing we say today is intended to foreclose prompt inspections, even without the warrant, that the law has

[35]It appears at least a majority of the Court would permit the use of area search warrants, 413 U.S. 266, 270, 277-285, 288, but in the absence of a warrant probable cause is required. 413 U.S. 266, 274-275, 281.

[36]Neither warrant nor probable cause are necessary for stop and search of the automobile in Imperial County (rural county) 25 miles from border. 413 U.S. 266, 285-299. (Dissent)

[37]In certain limited circumstances, neither probable cause nor a warrant is required. 413 U.S. 266, 277.

traditionally upheld *in emergency situations.*" 387 U.S. 523, 539. The alien problem cannot fairly be treated as an emergency as compared to the seizure or destruction of unwholesome food, compulsory vaccinations, or health quarantines. It would follow that if warrants are required for general community health (*Camara*) and fire protection (*See*) inspections, they would certainly be necessary in determining the Government's ephemeral concept of area-wide equivalent of probable cause that is operable in only certain parts of the United States.[38]

The roving patrol, the subject matter in *Almeida-Sanchez,* could be reasonably regulated through a warrant, which for not longer than the specified 10-day period[39] could permit a designated patrol of certain routes in an appropriate area in the immediate or proximate vicinity of the border. The warrant would specifically detail the procedure for a stop and the questions to be asked. The specific time of day such patrol could be operated could also be limited. Such warrants are not beyond comprehension.[40] In the

[38]Although the concept of the functional equivalent of probable cause is unstructured, Justice Powell gave, in comparison to the Government's concept, substantial specificity in a four-point standard (413 U.S. 266, 283-284) neither referred to nor apparently relied upon by the Government. The respondent would contend that an answer to these four-points are constitutionally necessary before a court may even consider "area-wide equivalent of probable cause."

[39]Rule 41(c), Federal Rules of Criminal Procedure.

[40]See *United States v. Ortiz*, No. 73-2050, Brief for Resp. Appendix A. Although such warrants are conceptually feasible, they are not now authorized by statute or rule (*Cf.* Rule 41, Federal Rules of Criminal Procedure).

request for such warrants, the Border Patrol could support their showing of need by reference to the complementary and interrelated efforts of other patrols or checkpoints, which would also be the subject of warrant applications.

Reference to *United States v. United States District Court*, 407 U.S. 297 (1972), supports the respondent's position for the necessity of a warrant. If the listening by federal officers to a conversation—an invasion of privacy that may cause no physical intrusion (i.e. *Katz v. United States*, 389 U.S. 347, 354-359 (1967)) demands a warrant, then all the more reason exists to require a warrant to permit officers to forcibly stop a travelling vehicle and actively interrogate the persons as to their citizenship.

The reference to license checks of drivers of motor vehicles is not comparable to an alien check, for as the Court of Appeals *en banc* properly noted "there was no way for a police officer to determine that a driver had a valid driver's license permitting him to operate a motor vehicle other than by stopping him and asking him to produce his license." *United States v. Bowen*, 500 F.2d 960, 964 (9th Cir. 1974).[41] A highway user

[41] This is substantially quoted from one of the leading cases authorizing a traffic stop. *Lipton v. United States*, 348 F.2d 591, 593 (9th Cir. 1965). In *United States v. Croft*, 429 F.2d 884, 886 (10th Cir. 1970), the defendant had not been singled out for a check by the roadblock. In *Myricks v. United States*, 370 F.2d 901 (5th Cir. 1967), the court held the power limited to traffic checks. *See United States v. Ortiz*, No. 73-2050, Brief for Resp. 46-47, 54-56. *Cf. Commonwealth v. Swanger*, 453 Pa. 107, 307 A.2d 875 (1973), where founded suspicion was held necessary for a license check stop.

may reasonably foresee a minor intrusion to see the permit for driving a car. The failure to possess such license, a minor offense, is greatly outweighed by the compelling state interest to insure that only competent drivers use the highway. The random patrol stop is more arbitrary than the roadblock technique, but the nature of intrusions cannot be compared with alien traffic checks purposely designed to ferret out serious criminal wrongdoing. However, such intervention might more effectively be conducted at or in the immediate vicinity of the border.[42]

Both *Camara* and the concurring opinion of Justice Powell in *Almeida-Sanchez* establish the requirement for a search warrant to justify the forcible stop of a moving vehicle proposed by the Government. The distance from the border, sixty miles, of this patrol stop further exemplifies the need for the intervention of neutral judicial scrutiny.

D. Under the announced rules of this Court since *Weeks v. United States* testimonial evidence obtained in violation of the Fourth Amendment must be suppressed.

Although not discussed by petitioner, the respondent submits that the Fourth Amendment would require the suppression of the testimony of the occupants of respondent's vehicle produced by the unlawful stop of the vehicle and interrogation of the occupants. The

[42] A stop might be permissible at a functional equivalent such as an established checkpoint *near the border* at a confluence of two or more roads extending from the border. *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-273 (1973).

Court of Appeals made reference to the case of *United States v. Guana-Sanchez*, 484 F.2d 590 (7th Cir. 1973), for the suppression of this testimony, and this Court has granted certiorari in that case, No. 73-820.[43] 417 U.S. 967 (1974). The respondent contends that notwithstanding the disposition in *Guana-Sanchez*, the testimonial evidence of the alien witnesses, as well as the cross-examination of the respondent as to items taken at the time of his arrest, must be suppressed.

In *Guana-Sanchez*, the Government argues that the questioning of the passengers in the light of that case (i.e. police assistance to lost persons) was proper, and "[t]he alleged 'search' of the car is no part of the case as it reaches this Court."[44] Guana-Sanchez made no incriminating statements, and his arrest yielded no information pointing to a commission of an offense.[45] Here the respondent's statements to the alien witnesses of "Here comes the immigration." and "They busted us." were used against him. (Tr. 33, 70). The respondent was also cross-examined as to his Mexican money to show a nexus with Mexico, and the American money as the possible motive for his conduct. (Tr. 90). The stopping and interrogation of the vehicle respondent was driving clearly gave him standing to contest the fruits of that unlawful governmental intervention.

In *Weeks v. United States*, 232 U.S. 383 (1914), this Court erected a bar to the unlawful conduct of police

[43]The police officers initially questioned the occupants of a car *parked off the road* to see if they were lost. (No. 73-820, Appendix pp. 9-10).

[44]No. 73-820, Brief for Pet. 13.

[45]No. 73-820, Brief for Pet. 13-14.

officers engaged in invasions of privacy to insulate the judiciary from any participation, implied or otherwise, in the unconstitutional conduct of the Executive or his agents:

> "To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." 232 U.S. 383, 394.

A serious difficulty would arise if a fictional or arbitrary distinction were created and attempted so as to apply the exclusionary rule only where physical or tangible evidence (and not testimonial) was obtained as a result of police conduct in violation of the Fourth Amendment. What if government agents made an unlawful search and reviewed documents, but instead of photocopying them, merely had a skillful agent memorize them (possibly with the aid of notes). Then, at trial, when the records were shown to be unavailable, the testimony of the agent would be introduced as to the contents of the documents. This Court has already condemned such action in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920), and there stated:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court *but that it shall not be used at all.*" (Emphasis added).

A similar situation arose in *Nardone v. United States*, 308 U.S. 338 (1939), where the Government unsuccessfully contended they were free to make use of

evidence derived from unlawfully intercepted telephone conversations. In that case was born the concept "fruit of the poisonous tree." 308 U.S. 338, 341.

The more current authority of *Wong Sun v. United States*, 371 U.S. 471 (1963), is controlling. There this Court stated:

> "The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion. It follows from our holding in *Silverman v. United States*, 365 U.S. 505, that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects.' Similarly, testimony as to matters observed during an unlawful invasion has been excluded in order to enforce the basic constitutional policies. *McGinnis v. United States*, 227 F.2d 598. Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion. See *Nueslein v. District of Columbia*, 115 F.2d 690. Nor do the policies underlying the exclusionary rule invite any logical distinction between physical and verbal evidence. Either in terms of deterring lawless conduct by federal officers, *Rea v. United States*, 350 U.S. 214, or of closing the doors of the federal courts to any use of evidence unconstitutionally obtained, *Elkins v. United States*, 364 U.S. 206, the danger in relaxing the exclusionary rules in the case of verbal evidence would seem too great to warrant introducing such a distinction." 371 U.S. 471, 485-486.

The Fourth Amendment clearly extends to oral statements of the defendant, *Katz v. United States*, 389 U.S. 347, 353 (1967).

The question of the standing of respondent should commence with an examination of the charges, 8 U.S.C. 1324(a)(2), for which the respondent was convicted. The illegal object, or contraband named in each count, was an illegal alien passenger in respondent's car. (C.R. 1-2). The concept of transportation includes possession or control so that the requisite possessory interest in the object of the offense is satisfied. If the respondent's car contained an unregistered firearm, a controlled substance, untaxed liquor, could the Government contend that respondent did not have standing? The stop and invasion of the respondent's automobile and these particular federal charges in which the seized and interrogated aliens were named, gave respondent standing. The decision in *Alderman v. United States*, 394 U.S. 165 (1969), offers further support for there the owner of the premises had standing to challenge the third-party conversations overheard by an invasion of his premises. Here, the invasion of the respondent's vehicle gave rise to the testimony of these witnesses against him. The words of Justice Clark, in another case where the Government contended that the respondent did not have the required standing, are apropos:

> "To hold that this search and seizure were lawful as to the respondent would permit a quibbling distinction to overturn a principle which was designed to protect a fundamental right."[46]

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[46] *United States v. Jeffers*, 342 U.S. 48, 52 (1951).

E. *Carroll* and its progeny, as well as established Ninth Circuit precedent, eliminate the issue of "retroactivity."[47]

Since *Carroll*, this Court has maintained an unbroken chain of precedent requiring probable cause to stop and search a moving vehicle, thus *Almeida-Sanchez* did not establish a "new rule."[48] In *Henry v. United States*, 361 U.S. 98 (1959), federal agents, having information amounting to "founded suspicion," but not probable cause, waved a car to a stop and were denied the fruits of that stop and search. Although the Government contends that the combination of *Camara* and *Terry* justify this roving patrol stop and interrogation, this Court has neither overruled nor deviated from the rule announced in *Carroll* and reiterated in subsequent cases.

Other related cases now before this Court involved a re-evaluation of 8 U.S.C. 1357(a)(3) by the Court of Appeals, but the Ninth Circuit in its first impression case involving 8 U.S.C. 1357(a)(1), relying on well-established circuit authority,[49] unanimously held that at least "founded suspicion" was required for this stop

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[47]If the issue of "retroactivity," or other arguments presented in Part I of the argument is decided against the respondent, the respondent would contend that Part II of the argument, *infra*, still presents an independent basis to support the reversal of his conviction by the Court of Appeals.

[48]Respondent would adopt and incorporate by reference *United States v. Ortiz*, No. 73-2050, Brief for Resp. 70-83.

[49]*United States v. Mallides*, 473 F.2d 859, 861 (9th Cir. 1973); *United States v. Ward*, 488 F.2d 162, 168-169 (9th Cir. 1973).

and interrogation. This case was controlled by pre-existing Supreme Court and Ninth Circuit authority.[50]

II.

THE FORCIBLE STOP AND INTERROGATION OF PERSONS TRAVELLING ON A HIGHWAY WHO APPEAR TO BE OF MEXICAN DESCENT WAS AN UNLAWFUL SEIZURE THAT CONSTITUTED INVIDIOUS DISCRIMINATION BASED ON RACE, ANCESTRY, OR NATIONAL ORIGIN WHICH REQUIRES THE SUPPRESSION OF THE RESULTANT EVIDENCE OR DISMISSAL OF THE CRIMINAL ACTION UNDER THE FOURTH AND FIFTH AMENDMENTS.

The Border Patrol agents candidly articulated their intention and purpose in forcibly stopping respondent's moving vehicle over sixty miles north of the border. The cross-examination of Border Patrol Agent Brady revealed:

> "Q. Did these people inside the car appear to be of Mexican descent to you?
> A. Yes, sir.
> Q And that, if there was any, appeared to be the reason that you stopped them?
> A. Yes, sir." (A. 9).

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[50]If warrantless stops are held unlawful, it is hoped this Court will follow the suggestion of the Government that the respondent should be given the benefit of the new rule. Brief for Pet. 9, n. 4.

Because the Court of Appeals held that the observation of the occupants as non-white or of Mexican descent did not constitute founded suspicion to justify the stop for illegal aliens, it did not have to reach the issue whether the Border Patrol agents have the authority to conduct such forcible stops of traffic for interrogation of persons as to possible alienage. Assuming such a power was found, the respondent would contend that the invidiously discriminatory manner in which it was exercised in the instant case requires either suppression of the resultant evidence or dismissal of the criminal charges against this defendant. The stop of the vehicle constituted a seizure of the vehicle in violation of the Fourth Amendment. *See Henry v. United states, supra.* However, this issue involving racial or ethnic discrimination rests more properly under the Fifth Amendment Due Process Clause. The Fifth Amendment contains no specific equal protection clause as the Fourteenth Amendment, but it forbids to federal authorities discrimination that is so unjustifiable as to be violative of due process. *Shapiro v. Thompson,* 394 U.S. 618, 641-642 (1969); *Schneider v. Rusk,* 377 U.S. 163, 168 (1964). This Court twenty years ago declared that the Constitution of the United States forbids discrimination by the Federal Government and its agents against an individual because of race. *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954).

The right to travel on the highways unimpeded without interference from federal agents was recognized in a Fourth Amendment context in *Carroll v. United States,* 267 U.S. 132, 153-154 (1925), and repeated in

Almeida-Sanchez v. United States, 413 U.S. 266, 274-275 (1973). The right of free travel in the interior of the United States is fundamental and has roots over 100 years old. In the *Passenger Cases*, 48 U.S. 282, 492 (1849), Chief Justice Taney stated:

> "We are all citizens of the United States; and as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own states."

In *United States v. Guest*, 383 U.S. 745, 758 (1966), this Court held:

> "Although the Articles of Confederation provided that 'the people of each state shall have free ingress and regress to and from any other State,' that right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution."

This fundamental right of travel was again recognized in *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969). Persons travelling in an automobile on the highway have inherent expectations of privacy—a right to be "left alone"—but if there is an intrusion that the travelling public may be forced to accept, such governmental action must be applied with an even hand. Invasion of privacy because a person appears to be of Mexican descent is not justified, and such an intrusion should not be tolerated by this Court. Persons appearing of

Mexican descent constitute an identifiable group or separate class so as to support a charge of invidious discrimination and are under the protection of equal protection or due process of the laws. *Hernandez v. Texas*, 347 U.S. 475, 479 (1954); *White v. Regester*, 412 U.S. 755, 767-770 (1973).

Assuming that the Government has discretion to stop without cause a vehicle and interrogate occupants under 8 U.S.C. 1357(a)(1) or (3), that power cannot be exercised to discriminate against persons appearing of Mexican descent.[51] The principle upon which respondent requests relief was stated long ago in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), where the Court held:

> "Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as to practically make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution." 118 U.S. 356, 373-374.

The petitioner in *Yick Wo* had been sentenced to jail for ten days by a police judges court for violation of a city ordinance. Although his writ of habeas corpus to the California Supreme Court was unsuccessful, this Court granted relief. There, the discrimination was on racial lines. Chinese had been denied applications to conduct a laundry business, while Caucasians had been

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[51] For the average person, this concept of appearance would be difficult to define. Physical characteristics might include dark skin and black hair, but there are persons in the Republic of Mexico who have fair skin and light hair.

granted the privilege. The law was neutral on its face, but was applied against those of Chinese ancestry. This Court held that the discretion of Government agents was limited by the principles of law. Government agents were subject to the law and were not permitted to deny one's liberty merely because they chose to do so.[52] The case antedating *Yick Wo* was *Chy Lung v. Freeman*, 92 U.S. 275 (1876), where the Court struck down the authority of a California Commissioner of Immigration empowered to go aboard ships and inspect foreigners for "lewd and debauched women." The Commissioner was to receive a fee for such examination and a fee for a bond. Although the statute was neutral on its face, it was applied to subjects of the Emperor of China. Justice Miller found the unfettered power of such an immigration inspector to be obnoxious, unlawful, and questioned how this law might be applied to subjects of other countries.[53] In *Hernandez v. Texas*,

[52]"But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." *Yick Wo v. Hopkins*, 118 U.S. 356, 370.

[53]Justice Miller asked, "Or if this plaintiff and her 20 companions had been the subjects of the Queen of Great Britain, can anyone doubt that this matter would have been the subject of international inquiry, if not a claim of redress?" 92 U.S. 275,

supra, the Texas system of selecting grand and petit jurors by the use of the jury commissioners was fair on its face and capable of being utilized without discrimination, but relief was still available because the system was susceptible to abuse and was employed in a discriminatory manner. 347 U.S. 475, 478-479.

More recently in *Oyler v. Boles*, 368 U.S. 448 (1962), Justice Clark speaking for the Court stated:

> "Moreover, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, *it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.*" 368 U.S. 448, 456 (Emphasis added).

Today, we look back with regret at the Governmental practices in the regulation and control of Chinese persons at the turn of the nineteenth century or those of Japanese ancestry during World War II. It is hoped that those who might be grouped as of apparent Mexican descent, illegal aliens, lawfully admitted permanent residents, Mexican aliens, and Mexican-Americans, and others who might have physical characteristics allegedly attributable to a person of Mexican descent, would not be singled out as the object of this Border Patrol stop and interrogation procedure.

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279. What would our State Department do if the Border Patrol only stopped vehicles in which the occupants appeared of Russian or Slavic descent? How would our newly restored diplomacy with the People's Republic of China be affected if INS stopped only persons of Chinese descent?

Yick Wo serves as an example of discrimination against the Chinese laborer who sought to work in the laundry business. In *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943), this Court stated: "Distinctions between citizens solely based on their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[54] The concurring opinion of Justice Murphy in that case has even greater application today:

> "Distinctions based on color and ancestry are utterly inconsistent with our traditions and ideals. They are at variance with the principles for which we are now waging war. We cannot close our eyes to the fact that for centuries the Old World has been torn by racial and religious conflicts and has suffered the worst kind of anguish because of inequality of treatment for different groups. There was one law for one and a different law for another. Nothing is written more firmly into our law than the compact of the Plymouth voyagers to have just and equal laws. To say that any group cannot be assimilated is to admit that the great American experiment has failed, that our way of life has failed when confronted with the normal attachment of certain groups to the land of their forefathers. As a nation we embrace many groups, some of them among the oldest settlements in our midst, which have isolated themselves for religious and cultural reasons." 320 U.S. 81, 110-111 (1943)[55]

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[54]Quoted in *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

[55]The State of California was acquired after a war with Mexico, and since Mexico is contiguous to the United States, it is only natural that persons of Mexican descent or lawfully admitted resident Mexican aliens should reside in an area near their former familial roots.

In *Korematsu v. United States*, 323 U.S. 214 (1944), the defendant, an American citizen of Japanese ancestry, was convicted for remaining in a designated military area in San Leandro, California. Although the Court justified the action because of the military situation which was characterized as the "gravest eminent danger to public safety," it is doubtful that such racially oriented governmental actions could be justified today.

Even if the person is an alien, he is still protected by the Constitution of the United States. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). This Court in recent years has held that aliens may not be denied welfare benefits, *Graham v. Richardson*, 403 U.S. 365 (1971), the opportunity to take competitive civil service positions, *Sugarman v. Dougall*, 413 U.S. 634 (1973), and the opportunity to practice law, *In re Griffiths*, 413 U.S. 717 (1973).[56] These cases highlight the fact that even a person *determined* to be an alien has protection, but in the instant case, prior to the Border Patrol agent stopping the car, their subjective determination was not that of *alienage* but the individuals appeared to be of Mexican descent. This important distinction was highlighted in the recent case of *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973). In that case a lawfully admitted resident alien from Mexico was not hired because she was an alien. This Court held that the employers discrimination was not because of her "national origin." 42 U.S.C. 2000e-2(a)(1). The company had in fact accepted

[56] See also *Takahashi v. Fish Comm'n*, 334 U.S. 410 (1948).

persons of Mexican origin, and this Court held that this federal statute did protect aliens from unfair discrimination and that it would have been unlawful for an employer to discriminate against aliens because of race, color, religion, sex, or national origin—for example, by hiring aliens of Anglo-Saxon background, but refusing to hire those of Mexican or Spanish ancestry. 414 U.S. 86, 95. So also it would be invidious discrimination if Border Patrol agents were to stop only those who appeared to be of Mexican ancestry, but did not interfere with the right of travel of those who appeared to be of Anglo-Saxon background.

Under the principles of *Davis v. Mississippi*, 394 U.S. 721 (1969), the evidence adduced as as result of the stop of respondent's vehicle and interrogation of the occupants of that vehicle should be suppressed under the Fourth Amendment. *Yick Wo* obtained his freedom by writ of habeas corpus, and this Court ordered him discharged from custody and imprisonment. 118 U.S. 356, 374. This defense was also recognized in *Two Guys v. McGinley*, 366 U.S. 582, 588 (1961).[57]

Justice Murphy dissenting in *Korematsu v. United States, supra*, indicated that the evacuation was not so much due to a war time emergency but rather racial antagonism. He stated:

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[57]This defense has also been recognized by the Courts of Appeals. See *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972); *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973) (*en banc*); *United States v. Crowthers*, 456 F.2d 1074, 1080 (4th Cir. 1972); *Shock v. Tester*, 405 F.2d 852, (8th Cir. 1969); *Washington v. United States*, 401 F.2d 915, 924 (D.C. Cir. 1968).

> "The reasons appear, instead, to be largely an accumulation of much of the misinformation, half-truths, and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices—the same people who have been among the foremost advocates of the evacuation." 323 U.S. 214, 239.

The institution by the Border Patrol of such racially oriented controls over Mexican and Mexican-Americans follows the perspicacious prediction of Justice Murphy:

> "To give constitutional sanction to that inference in this case, however well intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow." 323 U.S. 214, 240.

Then it was a wartime emergency which ostensibly justified the action taken. The Border Patrol, which has many other procedures or methods to control illegal alien traffic,[58] should be affirmatively denied the racially discriminatory technique. Since respondent's vehicle was stopped by virtue of this unconstitutional discrimination, his conviction must be reversed and the charges ordered dismissed.

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[58]Note 29, *supra*.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

JOHN J. CLEARY
CHARLES M. SEVILLA
FRANK J. RAGEN
Federal Defenders of San Diego, Inc.
925 First Avenue, Suite 260
San Diego, California 92101
(714) 293-5240

Attorneys for Respondent.

DATED: 15 January 1975

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-114

UNITED STATES OF AMERICA, PETITIONER

v.

FELIX HUMBERTO BRIGNONI-PONCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

As an alternate ground for affirming the judgment of the court of appeals, respondent argues (Br. 46-55) that the stop of his vehicle by Border Patrol agents was invidiously discriminatory in violation of the due process clause of the Fifth Amendment and that he is therefore entitled either to "suppression of the resultant evidence or dismissal of the criminal charges" against him (Br. 47).[1]

[1]Insofar as respondent argues that the charges against him should be dismissed, the issue is not properly presented in this Court. The court of appeals held that the evidence derived from the stop of respondent's automobile should not have been admitted (A. 17), and it reversed and remanded the case in light of that holding (A. 18). The court's judgment did not direct that the charges against respondent be dismissed. Since respondent filed no cross-petition for a writ of certiorari, he may not now seek a modification of the judgment under review. See *Strunk* v. *United States*, 412 U.S. 434, 437; *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512, 516; *National Labor Relations Board* v. *International Van Lines*, 409 U.S. 48, 52, n. 4. See also Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?*, 87 Harv. L. Rev. 763 (1974).

Respondent does not attack any legislative classification. Nor, for purposes of this argument, does he dispute the authority of Border Patrol officers, consistent with the Fourth Amendment, "to stop without cause a vehicle and interrogate occupants under 8 U.S.C. 1357(a)(1) and (3)" (Br. 49). His claim, rather, is that the authority conferred by that Section "cannot be used to discriminate against persons appearing of Mexican descent" (*ibid.*). "[I]t would be invidious discrimination," he says, "if Border Patrol agents were to stop only those who appeared to be of Mexican ancestry, but did not interfere with the right to travel of those who appeared to be of Anglo-Saxon background" (Br. 54).

Respondent's contentions are wholly hypothetical, for there is not a shred of evidence in this record or in the record in *United States* v. *Ortiz*, No. 73-2050, to support a claim that Border Patrol officers "stop only those who appear to be of Mexican ancestry" or that they use their statutory authority "to discriminate against persons appearing of Mexican descent." As we show in our reply brief in *Ortiz*, the record there demonstrates that the national origin characteristics of a vehicle's occupants are not the basis upon which officers determine whether the vehicle should be stopped for purposes of inquiry. The characteristic appearance of Mexican *residents* is what the officers look for.

Respondent appears to rest his charge of invidiously discriminatory practices by the Border Patrol solely upon an agent's single affirmative response to defense counsel's questions on cross-examination in this case (A. 8-9):

> Q: Agent Brady, what was the reason you stopped the car?
>
> A: Routine immigration inspection.

Q: You said there was nothing unusual about it, other than it was traveling north, is that correct?

A: That's true.

* * * *

Q: Could you see the occupants of the car from your position on the roadway?

A: Yes, sir.

* * * *

Q: Did these people inside the car appear to be of Mexican descent to you?

A: Yes, sir.

Q: And that, if there was any, appeared to be the reason you stopped them?

A: Yes, sir.

There is nothing in the record to suggest that it was the agent's practice to stop all cars containing persons who appeared to be of Mexican descent or to stop only such cars. All that can be said is that the agent determined to stop *this* car to inquire as to the citizenship of the three occupants who appeared to be of Mexican descent.

The reasonableness of the agent's action should be viewed in light of the surrounding circumstances. As we showed in our opening brief (pp. 20-21, 30-31), Border Patrol Agents Brady and Harkins were observing traffic during the early evening hours on a highway frequently used to transport illegal entrants, at the site of the closed San Clemente checkpoint where more than 12,000 deportable aliens were apprehended in fiscal year 1973. Their patrol car was at a 90-degree angle to the highway, and their headlights were on. It is understandable, in those circumstances, that

a northbound vehicle carrying three persons of apparent Mexican descent might arouse the suspicions of the agents. Those suspicions in this case were borne out, for the agents discovered after stopping the car that the two passengers were illegal entrants and that the driver, respondent, was engaged in unlawfully transporting those aliens knowing them to be in this country illegally.

The officers' actions were not invidiously discriminatory. It is because racial or ethnic characteristics are in most circumstances irrelevant that discrimination on the basis of such characteristics is forbidden. *Hirabayashi* v. *United States,* 320 U.S. 81, 100. But we are dealing here with an immigration law enforcement problem of immense proportions, and nearly all the violators in the Mexican border area are illegal entrants from Mexico. Since the class of violators is composed of persons who are likely to appear to be of Mexican descent, it is not impermissible for law enforcement officers to take that fact into account in determining which persons should be asked about their citizenship. The situation here is analogous to that in which law enforcement officers are given descriptions of robbery suspects that include the suspects' race. Surely it would not be impermissible for the officers to limit their investigation to persons who fit the descriptions. Similarly, "common sense [dictates] that race may be a relevant factor in some circumstances in determining whether to question a person about his immigration status." *Hon Keung Kung* v. *District Director,* 356 F. Supp. 571, 575 (E.D. Mo); see also *United States* v. *Saldana,* 453 F.2d 352, 354 (C.A. 10).

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN C. KEENEY,
Acting Assistant Attorney General.

MARK L. EVANS,
Assistant to the Solicitor General.

JEROME M. FEIT,
REUBEN H. WALLACE, JR.,
Attorneys.

FEBRUARY 1975.

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* BRIGNONI-PONCE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74–114. Argued February 18, 1975—Decided June 30, 1975

The Fourth Amendment does not allow a roving patrol of the Border Patrol to stop a vehicle near the Mexican border and question its occupants about their citizenship and immigration status, when the only ground for suspicion is that the occupants appear to be of Mexican ancestry. Except at the border and its functional equivalents, patrolling officers may stop vehicles only if they are aware of specific articulable facts, together with rational inferences therefrom, reasonably warranting suspicion that the vehicles contain aliens who may be illegally in the country. Pp. 4–13.

(a) Because of the important governmental interest in combating the illegal entry of aliens at the border, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border, an officer, whose observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, may stop the car briefly, question the driver and passengers about their citizenship and immigration status, and ask them to explain suspicious circumstances; but any further detention or search must be based on consent or probable cause. Pp. 4–8.

(b) To allow roving patrols the broad and unlimited discretion urged by the Government to stop all vehicles in the border area without any reason to suspect that they have violated any law, would not be "reasonable" under the Fourth Amendment. Pp. 8–9.

(c) Assuming that Congress has the power to admit aliens on condition that they submit to reasonable questioning about their right to be in the country, such power cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens.

Syllabus

The Fourth Amendment therefore forbids stopping persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens. Pp. 9–10.

499 F. 2d 1109, affirmed.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, and REHNQUIST, JJ., joined. REHNQUIST, J., filed a concurring opinion. BURGER, C. J., filed an opinion concurring in the judgment, in which BLACKMUN, J., joined. DOUGLAS, J., filed an opinion concurring in the judgment. WHITE, J., filed an opinion concurring in the judgment, in which BLACKMUN, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 74-114

United States, Petitioner,
v.
Felix Humberto Brignoni-Ponce.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 30, 1975]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case raises questions as to the United States Border Patrol's authority to stop automobiles in areas near the Mexican border. It differs from our decision in *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973), in that the Border Patrol does not claim authority to search cars, but only to question the occupants about their citizenship and immigration status.

I

As a part of its regular traffic checking operations in southern California, the Border Patrol operates a fixed checkpoint on Interstate Highway 5 south of San Clemente. On the evening of March 11, 1973, the checkpoint was closed because of inclement weather, but two officers were observing northbound traffic from a patrol car parked at the side of the highway. The road was dark, and they were using the patrol car's headlights to illuminate passing cars. They pursued respondent's car and stopped it, saying later that their only reason for doing so was that its three occupants appeared to be of Mexican descent. The officers questioned respondent and his two passengers about their citizenship and

learned that the passengers were aliens who had entered the country illegally. All three were then arrested, and respondent was charged with two counts of knowingly transporting illegal immigrants, a violation of 8 U. S. C. § 1324 (a)(2). At trial respondent moved to suppress the testimony of and about the two passengers, claiming that this evidence was the fruit of an illegal seizure. The trial court denied the motion, the aliens testified at trial, and respondent was convicted on both counts.

Respondent's appeal was pending in the Ninth Circuit Court of Appeals when we announced our decision in *Almeida-Sanchez* v. *United States*, *supra*, holding that the Fourth Amendment prohibits the use of roving patrols to search vehicles, without a warrant or probable cause, at points removed from the border and its functional equivalents. The Court of Appeals, sitting en banc, held that the stop in this case more closely resembled a roving patrol stop than a stop at a traffic checkpoint, and applied the principles of *Almeida-Sanchez*.[1] The court held that the Fourth Amendment, as interpreted in *Almeida-Sanchez*, forbids stopping a vehicle, even for the limited purpose of questioning its occupants, unless the officers have a "founded suspicion" that the occupants are aliens illegally in the country. The court refused to find that Mexican ancestry alone supported such a "founded suspicion" and held that respondent's motion to suppress should have been granted.[2] *United*

[1] For the Court of Appeals' purposes, the distinction between a roving patrol and a fixed checkpoint was controlling. The court previously had held that the principles of *Almeida-Sanchez* applied retrospectively to the activities of roving patrols but not to those of fixed checkpoints. See *United States* v. *Peltier*, 500 F. 2d 985 (CA9 1974), rev'd, — U. S. — (1975); *United States* v. *Bowen*, 500 F. 2d 960 (CA9 1974), aff'd, — U. S. — (1975).

[2] There may be room to question whether voluntary testimony of a witness at trial, as opposed to a government agent's testimony

States v. *Brignoni-Ponce*, 499 F. 2d 1109 (CA9 1974). We granted certiorari and set the case for oral argument with Nos. 73–2050 and 73–6848. 419 U. S. 824 (1974).

The Government does not challenge the Court of Appeals' factual conclusion that the stop of respondent's car was a roving-patrol stop rather than a checkpoint stop. Brief for the United States, at 8. Nor does it challenge the retroactive application of *Almeida-Sanchez*, *id.*, at 9, or contend that the San Clemente checkpoint is the functional equivalent of the border. The only issue presented for decision is whether a roving patrol may stop a vehicle in an area near the border and question its occupants when the only ground for suspicion is that the occupants appear to be of Mexican ancestry. For the reasons that follow, we affirm the decision of the Court of Appeals.

II

The Government claims two sources of statutory authority for stopping cars without warrants in the border areas. Section 287 (a)(1) of the Immigration and Nationality Act, 8 U. S. C. § 1357 (a)(1) (1970), authorizes any officer or employee of the Immigration and Naturalization Service, without a warrant, "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States." There is no geographical limitation on this authority. The Government contends that, at least in the areas adjacent to the Mexican border, a person's apparent Mexican

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about objects seized or statements overheard, is subject to suppression as the fruit of an illegal search or seizure. See *United States* v. *Guana-Sanchez*, 484 F. 2d 590 (CA7 1973), writ dismissed as improvidently granted, 420 U. S. 513 (1975). But since the question was not raised in the petition for certiorari, we do not address it.

ancestry alone justifies belief that he or she is an alien and satisfies the requirement of this statute. Section 287 (a)(3) of the Act, 8 U. S. C. § 1357 (a)(3) (1970), authorizes agents, without a warrant,

> "within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle . . . ."

Under current regulations, this authority may be exercised anywhere within 100 miles of the border. 8 CFR § 287.1 (a) (1975). The Border Patrol interprets the statute as granting authority to stop moving vehicles and question the occupants about their citizenship, even when its officers have no reason to believe that the occupants are aliens or that other aliens may be concealed in the vehicle.[3] But "no Act of Congress can authorize a violation of the Constitution," *Almeida-Sanchez, supra,* at 272, and we must decide whether the Fourth Amendment allows such random vehicle stops in the border areas.

III

The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. *Davis* v. *Mississippi,* 394 U. S. 721 (1969); *Terry* v. *Ohio,* 392 U. S. 1, 16–19 (1968). "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person," *Terry* v. *Ohio, supra,* at 16, and the

[3] We cannot accept respondent's contention that, even though § 287 (a)(3) does not mention probable cause, its legislative history establishes that Congress meant to condition immigration officers' authority to board and search vehicles on probable cause to believe that they contained aliens. The legislative history simply does not support this contention.

Fourth Amendment requires that the seizure be "reasonable." As with other categories of police action subject to Fourth Amendment constraints, the reasonableness of such seizures depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers. *Terry* v. *Ohio, supra,* at 20–21; *Camara* v. *Municipal Court,* 387 U. S. 523, 536–537 (1967).

The Government makes a convincing demonstration that the public interest demands effective measures to control the illegal entry of aliens at the Mexican border. Estimates of the number of illegal immigrants in the United States vary widely. A conservative estimate in 1972 produced a figure of about one million, but the Immigration and Naturalization Service now suggests there may be as many as 10 or 12 million aliens illegally in the country.[4] Whatever the number, these aliens create significant economic and social problems, competing with citizens and legal resident aliens for jobs, and generating extra demand for social services. The aliens themselves are vulnerable to exploitation because they cannot complain of substandard working conditions without risking deportation. See generally Hearings on Illegal Aliens before Subcomm. No. 1 of the House Comm. on the Judiciary, 92d Cong., 1st Sess., ser. 13, pts. 1–5 (1971–1972).

The Government has estimated that 85% of the aliens illegally in the country are from Mexico. *United States*

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[4] The estimate of one million was produced by the Commissioner of the INS for the Immigration and Nationality Subcommittee of the House Judiciary Committee. Hearings on Illegal Aliens before Subcomm. No. 1 of the House Comm. on the Judiciary, 92d Cong., 1st Sess., ser. 13, pt. 5, at 1323–1325 (1972). The higher estimate appears in the 1974 Annual Report of the Immigration and Naturalization Service, at iii.

v. *Baca*, 368 F. Supp. 398, 402 (SD Cal. 1973).[5] The Mexican border is almost 2,000 miles long, and even a vastly reinforced Border Patrol would find it impossible to prevent illegal border crossings. Many aliens cross the Mexican border on foot, miles away from patrolled areas, and then purchase transportation from the border area to inland cities, where they find jobs and elude the immigration authorities. Others gain entry on valid temporary border-crossing permits, but then violate the conditions of their entry. Most of these aliens leave the border area in private vehicles, often assisted by professional "alien smugglers." The Border Patrol's traffic checking operations are designed to prevent this inland movement. They succeed in apprehending some illegal entrants and smugglers, and they deter the movement of others by threatening apprehension and increasing the cost of illegal transportation.

Against this valid public interest we must weigh the interference with individual liberty that results when an officer stops an automobile and questions its occupants. The intrusion is modest. The Government tells us that a stop by a roving patrol "usually consumes no more than a minute." Brief for the United States, at 25. There is no search of the vehicle or its occupants, and the visual inspection is limited to those parts of the vehicle that can be seen by anyone standing alongside.[6] According

[5] This estimate tends to be confirmed by the consistently high proportion of Mexican nationals in the number of deportable aliens arrested each year. In 1970, for example, 80% of the deportable aliens arrested were from Mexico. See INS, 1970 Annual Report, at 95. In 1974, the figure was 92%. INS, 1974 Annual Report, at 94.

[6] In this case the officers did search respondent's car, but because they found no other incriminating evidence the validity of the search is not in issue. *Almeida-Sanchez* changed the Border Patrol's practice of searching cars on routine stops, and the Government informs us that roving patrols now search vehicles only when they have

to the Government, "[a]ll that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States." *Ibid.*

Because of the limited nature of the intrusion, stops of this sort may be justified on facts that do not amount to the probable cause required for an arrest. In *Terry* v. *Ohio*, *supra*, the Court declined expressly to decide whether facts not amounting to probable cause could justify an "investigative seizure" short of an arrest, 392 U. S., at 19 n. 16, but it approved a limited search—a pat-down for weapons—for the protection of an officer investigating suspicious behavior of persons he reasonably believed to be armed and dangerous. The Court approved such a search on facts that did not constitute probable cause to believe the suspects guilty of a crime, requiring only that "the police officer . . . be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" a belief that his safety or that of others is in danger. *Id.*, at 21, 27.

We elaborated on *Terry* in *Adams* v. *Williams*, 407 U. S. 143 (1972), holding that a policeman was justified in approaching the respondent to investigate a tip that he was carrying narcotics and a gun.

> "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. . . . A brief stop of a suspicious individual, in order to determine his

probable cause to believe they will find illegally present aliens or contraband. Brief for the United States, at 25.

identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Id.*, at 145–146.

These cases together establish that in appropriate circumstances the Fourth Amendment allows a properly limited "search" or "seizure" on facts that do not constitute probable cause to arrest or to search for contraband or evidence of crime. In both *Terry* and *Adams* v. *Williams* the investigating officers had reasonable grounds to believe that the suspects were armed and that they might be dangerous. The limited searches and seizures in those cases were a valid method of protecting the public and preventing crime. In this case as well, because of the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border, we hold that when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion. As in *Terry*, the stop and inquiry must be "reasonably related in scope to the justification for their initiation." 392 U. S., at 29. The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause.

We are unwilling to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving-patrol stops.[7] In the context of border area stops, the

[7] Because the stop in this case was made without a warrant and the officers made no effort to obtain one, we have no occasion to decide whether a warrant could be issued to stop cars in a designated

reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government. Roads near the border carry not only aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well. San Diego, with a metropolitan population of 1.4 million, is located on the border. Texas has two fairly large metropolitan areas directly on the border: El Paso, with a population of 360,000, and the Brownsville-McAllen area, with a combined population of 320,000. We are confident that substantially all of the traffic in these cities is lawful and that relatively few of their residents have any connection with the illegal entry and transportation of aliens. To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers. The only formal limitation on that discretion appears to be the administrative regulation defining the term "reasonable distance" in § 287 (a)(3) to mean within 100 air miles from the border. 8 CFR § 287.1 (a) (1975). Thus, if we approved the Government's position in this case, Border Patrol officers could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road, without any reason to suspect that they have violated any law.

We are not convinced that the legitimate needs of law enforcement require this degree of interference with law-

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area on the basis of conditions in the area as a whole and in the absence of reason to suspect that any particular car is carrying aliens. See *Almeida-Sanchez, supra,* at 275 (MR. JUSTICE POWELL, concurring); *Camara* v. *Municipal Court,* 387 U. S. 523 (1967).

ful traffic. As we discuss in Part IV, *infra*, the nature of illegal alien traffic and the characteristics of smuggling operations tend to generate articulable grounds for identifying violators. Consequently, a requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference. Under the circumstances, and even though the intrusion incident to a stop is modest, we conclude that it is not "reasonable" under the Fourth Amendment to make such stops on a random basis.[8]

The Government also contends that the public interest in enforcing conditions on legal alien entry justifies stopping persons who may be aliens for questioning about their citizenship and immigration status. Although we may assume for purposes of this case that the broad congressional power over immigration, see *Kleindienst* v. *Mandel*, 408 U. S. 753, 765–767 (1972), authorizes Congress to admit aliens on condition that they will submit to reasonable questioning about their right to be and remain in the country, this power cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens. For the same reasons that the Fourth Amendment forbids stopping vehicles at random to

[8] Our decision in this case takes into account the special function of the Border Patrol, the importance of the governmental interests in policing the border area, the character of roving-patrol stops, and the availability of alternatives to random stops unsupported by reasonable suspicion. Border Patrol agents have no part in enforcing laws that regulate highway use, and their activities have nothing to do with an inquiry whether motorists and their vehicles are entitled, by virtue of compliance with laws governing highway usage, to be upon the public highways. Our decision thus does not imply that state and local enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding driver's licenses, vehicle registration, truck weights, and similar matters.

inquire if they are carrying aliens who are illegally in the country, it also forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens.

IV

The effect of our decision is to limit exercise of the authority granted by both § 287 (a)(1) and § 287 (a)(3). Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.[9]

Any number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area. Officers may consider the characteristics of the area in which they encounter a vehicle. Its proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic are all relevant. See *Carroll* v. *United States*, 267 U. S. 132, 159–161 (1925); *United States* v. *Jaime-Barrios*, 494 F. 2d 455 (CA9), cert. denied, 417 U. S. 972 (1974).[10] They also may consider information about recent illegal border crossings in the area. The driver's behavior may be rele-

[9] As noted above, we reserve the question whether Border Patrol officers also may stop persons reasonably believed to be aliens when there is no reason to believe they are illegally in the country. See *Cheung Tin Wong* v. *INS*, — U. S. App. D. C. —, 468 F. 2d 1123 (1972); *Au Yi Lau* v. *INS*, 144 U. S. App. D. C. 147, 445 F. 2d 217, cert. denied, 404 U. S. 864 (1971). The facts of this case do not require decision on the point. *Infra*, at 12.

[10] The courts of appeals decisions cited throughout this section are merely illustrative. Our citation of them does not imply a view of the merits of particular decisions. Each case must turn on the totality of the particular circumstances.

vant, as erratic driving or obvious attempts to evade officers can support a reasonable suspicion. See *United States* v. *Larios-Montes*, 500 F. 2d 941 (CA9 1974); *Duprez* v. *United States*, 435 F. 2d 1276 (CA9 1970). Aspects of the vehicle itself may justify suspicion. For instance, officers say that certain station wagons, with large compartments for fold-down seats or spare tires, are frequently used for transporting concealed aliens. See *United States* v. *Bugarin-Casas*, 484 F. 2d 853 (CA9 1973), cert. denied, 414 U. S. 1136 (1974); *United States* v. *Wright*, 476 F. 2d 1027 (CA5 1973). The vehicle may appear to be heavily loaded, it may have an extraordinary number of passengers, or the officers may observe persons trying to hide. See *United States* v. *Larios-Montes*, *supra*. The Government also points out that trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut. Reply Brief for the United States in *United States* v. *Ortiz*, at 12–13. In all situations the officer is entitled to assess the facts in light of his experience detecting illegal entry and smuggling. *Terry* v. *Ohio*, *supra*, at 27.

In this case the officers relied on a single factor to justify stopping respondent's car: the apparent Mexican ancestry of the occupants.[11] We cannot conclude that this furnished reasonable grounds to believe that the three occupants were aliens. At best the officers had only a

[11] The Government also argues that the location of this stop should be considered in deciding whether the officers had adequate reason to stop respondent's car. This appears, however, to be an after-the-fact justification. At trial the officers gave no reason for the stop except the apparent Mexican ancestry of the car's occupants. It is not even clear that the Government presented the broader justification to the Court of Appeals. We therefore decline at this stage of the case to give any weight to the location of the stop.

fleeting glimpse of the persons in the moving car, illuminated by headlights. Even if they saw enough to think that the occupants were of Mexican descent, this factor alone would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country. Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens.[12] The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.

The judgment of the Court of Appeals is

Affirmed.

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[12] The 1970 census and the INS figures for alien registration in 1970 provide the following information about the Mexican-American population in the border States. There were 1,619,064 persons of Mexican origin in Texas, and 200,004 (or 12.4%) of them registered as aliens from Mexico. In New Mexico there were 119,049 persons of Mexican origin, and 10,171 (or 8.5%) registered as aliens. In Arizona there were 239,811 persons of Mexican origin, and 34,075 (or 14.2%) registered as aliens. In California there were 1,857,267 persons of Mexican origin, and 379,951 (or 20.4%) registered as aliens. Bureau of the Census, Subject Reports: Persons of Spanish Origin 2 (1970); INS, 1970 Annual Report, at 105. These figures, of course, do not present the entire picture. The number of registered aliens from Mexico has increased since 1970, INS, 1974 Annual Report, at 105, and we assume that very few illegal immigrants appear in the registration figures. On the other hand, many of the 950,000 other persons of Spanish origin living in these border States, see Bureau of the Census, *supra*, at 1, may have a physical appearance similar to persons of Mexican origin.

SUPREME COURT OF THE UNITED STATES

No. 74–114

United States, Petitioner,
v.
Felix Humberto Brignoni-Ponce.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 30, 1975]

MR. JUSTICE REHNQUIST, concurring.

I join in the opinion of the Court. I think it quite important to point out, however, that that opinion, which is joined by a somewhat different majority than that which comprised the *Almeida* court, is both by its terms and by its reasoning concerned only with the type of stop involved in this case. I think that just as travelers entering the country may be stopped and searched without probable cause and without founded suspicion, because of "national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in," *Carroll* v. *United States*, 267 U. S. 132, 154 (1925), a strong case may be made for those charged with the enforcement of laws conditioning the right of vehicular use of a highway to likewise stop motorists using highways in order to determine whether they have met the qualifications prescribed by applicable law for such use. See *Cady* v. *Dombrowski*, 413 U. S. 433, 440–441 (1973); *United States* v. *Biswell*, 406 U. S. 311 (1972). I regard these and similar situations, such as agricultural inspections and highway roadblocks to apprehend known fugitives, as not in any way constitutionally suspect by reason of today's decision.

SUPREME COURT OF THE UNITED STATES

Nos. 74–114 AND 73–2050

United States, Petitioner,
74–114 *v.*
Felix Humberto Brignoni-Ponce.

United States, Petitioner,
73–2050 *v.*
Luis Antonio Ortiz.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 30, 1975]

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACKMUN joins, concurring in the judgment.

Like MR. JUSTICE WHITE I can, at most, do no more than concur in the judgment. As the Fourth Amendment now has been interpreted by the Court it seems that the Immigration and Naturalization Service is powerless to stop the tide of illegal aliens—and dangerous drugs—that daily and freely crosses our 2,000-mile southern boundary.[1] Perhaps these decisions will be seen in perspective as but another example of a society seemingly impotent to deal with massive lawlessness. In that sense history may view us as prisoners of our own

[1] The Court today recognizes that as many as 12 million illegal aliens are now present in this country. *Ante*, at 5 and n. 4. See also U. S. News and World Report, 27, July 22, 1974; U. S. News and World Report, 77, December 9, 1974. By all indications the problem will increase in the future, not abate. *United States* v. *Baca*, 368 F. Supp. 398, 402–403 (SD Cal. 1973). In the *Baca* case Judge Turrentine conducted a thorough review of the entire problem and the present Government response. Appended to this opinion is an excerpt from Judge Turrentine's *Baca* opinion describing the illegal alien problem and the law enforcement response. *Id.*, at 402–408.

traditional and appropriate concern for individual rights, unable—or unwilling—to apply the concept of reasonableness explicit in the Fourth Amendment in order to develop a rational accommodation between those rights and the literal safety of the country.

Given today's decisions it would appear that, absent legislative action, nothing less than a massive force of guards could adequately protect our southern border.[2] To establish hundreds of checkpoints with enlarged border forces so as to stop literally every car and pedestrian at every border checkpoint, however, would doubtless impede the flow of commerce and travel between this country and Mexico. Moreover, it is uncertain whether stringent penalties for employment of illegal aliens, and rigid requirements for proof of legal entry before employment, would help solve the problems, but those remedies have not been tried.

I would hope that when we next deal with this problem we give greater weight to the reality that the Fourth Amendment prohibits only "*unreasonable* searches and seizures" and to the frequent admonition that reasonableness must take into account all the circumstances and balance the rights of the individual with the needs of society. See, *e. g.*, *Terry* v. *Ohio*, 392 U. S. 1 (1968); *Elkins* v. *United States*, 364 U. S. 206 (1960); *United States* v. *Biswell*, 406 U. S. 311 (1972).

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[2] For example, testimony in the *Baca* hearings revealed that a complement of 21,000 officers would be needed to control adequately the 75 miles of border in the El Centro sector alone.

APPENDIX

THE ILLEGAL ALIEN PROBLEM

The United States through legislative action has determined that it is in the best interests of the nation to limit the number of persons who can legally immigrate into the country in any given year. These controls reflect in part a Congressional intent to protect the American labor market from an influx of foreign labor. *Karnuth* v. *United States*, 279 U. S. 231 (1929); § 201 (b) of the *Immigration and Nationality Act of 1952*, 66 Stat. 163, as amended by the Act of October 3, 1965, 79 Stat. 911, 8 U. S. C. § 1151 (a).

Under this policy of limited admission, 385,685 new immigrants entered the United States legally during fiscal year 1972. Since July 1, 1968, the law has established an annual quota of 120,000 persons for the independent countries of the Western Hemisphere. Included within this quota are immigrants from the Republic of Mexico who in fiscal year 1972 totalled 64,040. 1972 Annual Report, *Immigration and Naturalization Service*, p. 2.

Currently illegal aliens are in residence within the United States in numbers which, while not susceptible of exact measurement, are estimated to be in the vicinity of 800,000 to over one million. Department of Justice, Special Study Group on Illegal Immigrants from Mexico, *A Program for Effective And Humane Action on Illegal Mexican Immigrants*, 6 (1973), [hereinafter cited as *Cramton Rtp.*].

Of these illegal aliens, approximately 85 percent are citizens of Mexico. *Cramton Rpt.*, at 6. They are industrious, proud and hard-working people who enter this country for the purpose of earning wages, accumulating

savings, and returning or sending their savings home to Mexico.

Since 1970, the number of illegal Mexican aliens in the United States who have been apprehended has been growing at a rate in excess of 20 percent per year. *Cramton Rpt.*, at 6.

The increasingly large number of Mexican nationals seeking to illegally enter this country reflects the substantial unemployment and underemployment in Mexico—fueled by one of the highest birth rates in the world. Moreover, Mexican employment statistics are not likely to improve dramatically since fully 45 percent of Mexico's population is under 15 years of age and, therefore, will soon be attempting to enter the labor market.

Further prompting Mexican nationals to seek employment in the United States is the fact that there is a significant disparity in wage rates between this country and Mexico. In Mexicali and Tijuana, both Mexican cities bordering the Southern District and each with a population in excess of 400,000, the average daily wage is about $3.40 per day. The minimum wage is even lower for workers in the interior of Mexico. The average worker in Mexico, assuming he can find work, earns in a day as much as he can make in only a few hours in the United States.

In addition, it is estimated that the per capita income of the poorest 40 percent of the Mexican population, the strata most likely to leave their homeland in search of a better life in the United States, is less than $150 per year.

The manpower needs of the United States generated by World War II resulted in many Mexicans being imported into this country and becoming familiar with employment opportunities and practices in the United States. See *Diaz* v. *Kay-Dix Ranch*, 9 Cal. App. 3d 595 (1970).

The opportunities available to Mexican aliens have traditionally been in agriculture. While still true in many parts of the United States Southwest, in recent years the pattern has changed and more and more illegal aliens are obtaining employment in service and manufacturing sectors of our economy. These aliens are increasingly found in virtually all regions of the country and in all segments of the economy. State Social Welfare Board, *Issue: Aliens in California*, 12 (1973) [Hereinafter cited as *Aliens in California*].

The nature of the change in employment opportunities available is demonstrated by one estimate that 250,000 illegal aliens are employed in Los Angeles County where agricultural opportunities are known to be limited. *Hearings on Illegal Aliens Before Subcomm. 1 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. 1, at 208 (1971) [Hereinafter cited as *Hearings on Illegal Aliens*].

Other estimates of the impact of illegal aliens in California suggests that in 1971, when 595,000 Californians were unemployed (7.4 percent of the State's labor force), there were between 200,000 and 300,000 illegal aliens employed in California earning approximately $100 million in wages. *Hearings on Illegal Aliens*, at 150.

Since the majority of Mexicans are unskilled or low skilled workers they tend to compete the Mexican-Americans, blacks, Indians, and other minority groups who, due to the declining percentage of jobs requiring low or no skills, are finding it increasingly difficult to obtain gainful employment. *Cramton Rpt.*, at 12.

Illegal aliens compete for jobs with persons legally residing in the United States who are unskilled and uneducated and who form that very group which our society is trying to provide with a fair share of America's prosperity.

In addition, illegal aliens tend to perpetuate poor economic conditions by frustrating unionization, especially in such occupations as farm work.

Illegal aliens pose a potential health hazard to the community since many seek work as nursemaids, food handlers, cooks, housekeepers, waiters, dishwashers, and grocery workers. Immigration and medical officials in Los Angeles, for example, have discovered that the illegal alien population in Los Angeles' barrio is infected with a high incidence of typhoid, dysentery, tuberculosis, tapeworms, venereal disease and hepatitis. *L. A. Times,* Sept. 16, 1973, pt. II, at 1.

In some states illegal aliens abuse public assistance programs. In some instances entire families who entered the country illegally have been admitted to the welfare rolls. *Aliens in California,* at 35, 43.

Another aspect of the problem created by illegal aliens is that employed aliens tend to send a substantial portion of their earnings to relatives or friends in Mexico. This outflow of United States dollars exacerbates our balance of payments problem to the extent of $1 billion a year. *Hearings on Illegal Aliens,* pt. 3, at 683.

The net effect of this silent invasion of illegal aliens from Mexico is suffering by the aliens who are frequently victims of extortion, violence and sharp practices, displacement of American citizens and legally residing aliens from the labor market, and irritation between two neighboring countries.

THE LAW ENFORCEMENT PROBLEM

Given that illegal aliens are a significant problem in American life, especially for those minority groups who are described as economically deprived, and that Congress has decreed that all but a relatively few aliens are to be permanently excluded, then we must analyze what

law enforcement problems exist. In this regard, the following findings of fact are made:

The illegal alien problem is one found primarily in the Southwestern Region of the United States.

This problem along the Mexican-American border has existed for some time with the original responsibility for securing the integrity of the border being assigned to the U. S. Army, along with the Departments of Treasury and Labor, who had about 20,000 men assigned to the border between Brownsville, Texas, and San Diego, California, in 1920. *National Geographic Magazine*, "Along Our Side of the Mexican Border" (July 1920).

Currently the burden of controlling the entry of aliens and stemming the flow of illegal aliens along the Mexican-American border is assigned to the INS.[3]

The border extends for almost 2,000 miles from the Gulf of Mexico to the Pacific Coast.

Along this border there were over 152 million legal entries at authorized ports of entry during fiscal 1972, of which over 91 million were made by aliens, with over 39 million legal entries being made at the three ports of entry in Southern California (Calexico, San Ysidro and Tecate) of which over 24 million were made by aliens. Immigration and Naturalization Service, *1972 Annual Report*, 25.

Of these entries made by aliens, the large portion were made by visitors with official permission to enter the country who had been issued temporary "border passes" such as I–186 cards (issued to residents of Mexico), which authorize the holder to travel within an area no further than 25 miles from the border and for a period of time not to exceed 72 hours. See 8 C. F. R. § 212.6.

These temporary border passes (I–186) are issued to

[3] The notation "INS" when used herein has reference to the Immigration and Naturalization Service.

simplify procedures needed for entry, and the issuing process recognizes the inter-relationship of contiguous communities along both sides of the border. *Hearings on Illegal Aliens*, pt. 1, 192.

In fiscal 1973 approximately 208,000 I–186 cards were issued and it is estimated that over two million such cards are currently in circulation. *Hearings on Illegal Aliens*, pt. 1, 173.

Within the INS, the U. S. Border Patrol, which was first established in 1924, has the primary function of preventing the illegal entry of aliens and the apprehension of those who have entered illegally and those who smuggle these illegal entrants.

The Border Patrol has approximately 1,700 agents, who are well-trained law enforcement officers, and of these about 80 percent are assigned along our southern border with Mexico.

A "deportable alien" is a person who has been found to be deportable by an immigration judge, or who admits his deportability upon questioning by official agents.

The number of deportable aliens apprehended by the Border Patrol (which makes the great majority of apprehensions) nationally has grown from 38,861 during fiscal 1963 to 498,123 in fiscal 1973; of this number 128,889 were found by Border Patrol agents working in the Chula Vista sector which includes 70 miles of the border in San Diego County, and 23,125 were located by agents in the El Centro sector which includes the Imperial County of California and 75 miles of the Mexican-American border.

The Border Patrol agents have the power to apprehend illegal aliens since by regulation the Attorney General has designated Border Patrol agents to be immigration officers and authorized them to exercise powers and duties as such officers [8 C. F. R. § 103.1 (i)]; immigra-

tion officers have been given certain functions by statute § 101 (a)(17) of the Immigration and Nationality Act of 1952, 66 Stat. 163; as amended by the Act of October 3, 1973, 79 Stat. 911, 8 U. S. C. § 1101 (a)(17), which provides that an officer of the INS shall have the power, without a warrant, to stop and interrogate any alien or person believed to be an alien as to his right to remain or to be in the United States. See *Au Yi Lau* v. *I. N. S.*, 445 F. 2d 217 (D. C. Cir. 1971), *cert. denied*, 404 U. S. 864.

Sec. 287 (a)(3) of the 1952 Immigration Act includes authority for an immigration officer within a reasonable distance from the border of the United States to board and search any conveyance or vehicle; "reasonable distance" as used in that section of the Act means within 100 air miles from any external boundary of the United States, 8 C. F. R. § 287.1 (b).

Immigration officers also are authorized to conduct inspection of aliens seeking admission or readmission to, or the privilege of passing through, the United States, and also are authorized and impowered to board and search any vehicle or like conveyance in which they believe aliens are being brought into the United States. Sec. 235 (a) of the 1952 Immigration Act, 8 U. S. C. § 1525 (a).

The deployment of Border Patrol agents along the border is intended to maximize the effectiveness of the limited number of personnel, with the first line of defense being called the "line watch." The line watch consists of agents being placed immediately upon the physical boundary where experience has shown that large numbers of illegal aliens can be detected attempting entry. A large number of agents so assigned are primarily concerned with responding to sensor alarms (electronic detection equipment) which are located at strategic

positions. These agents also respond to citizen complaints concerning the suspected presence of deportable aliens.

In fiscal 1973, there were 175,511 deportable aliens apprehended throughout the nation by agents assigned to the line watch, with 69,147 being apprehended in the Chula Vista sector and 5,908 in the El Centro sector.

While the Border Patrol would like to apprehend all deportable aliens right on the border by agents on the line watch, inspections at regular points of entry are not infallible and illegal crossings at other than legal ports of entry are numerous and recurring with the maintenance of continuous patrol over these vast stretches of the border in Southern California being physically impossible, for the approximately 145 miles of boundary creates physical barriers to effective patrol and man-made devices such as fences and electronic devices are in large part ineffective.

Increased manpower on line watch would not make that activity appreciably more effective as was demonstrated in 1969 during "Operation Intercept" wherein many more agents were stationed immediately on the border, and yet, the number of illegal aliens apprehended by agents operating inland was not significantly different from like periods when such additional manpower was not located at the boundary.

Once the aliens negotiate their way through the port of entry or walk across the border at a place other than an official port of entry, they find transportation inland either in public conveyances, or private vehicles with increasing numbers being transported by professional smugglers. A few have been known to walk some distance inland and be apprehended after having walked as far north as Julian, California, which is over 60 miles from the border.

After crossing the line watch some illegal aliens seek employment in the Southern District, but the vast majority attempt to proceed to Los Angeles County and further northward.

Once the illegal alien gets settled in a big city far away from the border it becomes very difficult to apprehend him, and, therefore, the Border Patrol attempts to contain the illegal entrant within this district. *Aliens in California*, at 7. With this objective in mind, they have (pursuant to their statutory authority discussed above) established, since at least 1927, strategically located traffic inspection facilities, commonly referred to as checkpoints, on highways and roads, for the purpose of questioning vehicle occupants believed to be aliens, as to their right to be, or to remain, in the United States, and also to search such vehicles for aliens illegally therein. Immigration and Naturalization Service, *Border Patrol Handbook* 9–1 (1972) [hereinafter cited as *Handbook*].

The primary objective of the checkpoints is to intercept vehicles or conveyances transporting illegal aliens, or nonresident aliens admitted with temporary border pasing cards (Form I–186), with particular attention being paid to vehicles operated by smugglers or transporters destined for the interior in violation of 8 U. S. C. § 1324.

The selection of the location of a checkpoint is determined by factors relevant to the interdiction or interception of deportable aliens who have succeeded in gaining entry in an unlawful manner or are proceeding beyond the immediate border area in violation of conditions of their admission as border crossers, 8 C. F. R. § 212.60. The primary factors in selecting a checkpoint site are:

1. A location on a highway just beyond the confluence of two or more roads from the border, in order to permit the checking of a large volume of traffic with a minimum

number of officers. This also avoids the inconvenience of repeated checking of commuter or urban traffic which would occur if the sites were operated on the network of roads leading from and through the more populated areas near the border.

2. Terrain and topography that restrict passage of vehicles around the checkpoint, such as mountains, desert, and as in the case of the San Clemente checkpoint, the Camp Pendleton Marine Base.

3. Safety factors: an unobstructed view of oncoming traffic, to provide a safe distance for slowing and stopping; parking space off the highway; power source to illuminate control signs and inspection area, and bypass capability for vehicles *not* requiring examination.

4. Due to the travel restrictions of the Form I–186 nonresident border crosser to an area 25 miles from the border (unless issued additional documentation) the checkpoints, as a general rule, are located at a point beyond the 25 mile zone in order to control the unlawful movement into the interior of such visitors, *Handbook.*

Strategic sites that meet the foregoing enumerated criteria are selected for "permanent checkpoints." These are sites equipped to handle a large volume of traffic on what would be a 24-hour basis except in case of manpower shortage, poor weather, or where traffic becomes excessive causing a potential safety hazard. *Handbook,* at 9–3.

Other traffic checkpoints, known as "temporary checkpoints" are maintained on roads where traffic is less frequent. The placement of these sites will be governed by the same safety factors as involved in permanent site placement and are usually located where the terrain allows an element of surprise. Operations at these temporary checkpoints are set up at irregular intervals and intermittently so as to confuse the potential violator. *Handbook,* at 9–3.

When the checkpoints, whether permanent or temporary, are in operation, an officer standing at the "point" in full dress uniform on the highway will view the decelerating oncoming vehicles and their passengers, and will visually determine whether he has reason to believe the occupants of the vehicle are aliens (i.e ., "breaks the pattern" of usual traffic). If so, the vehicle will be stopped (if the traffic at the checkpoint is heavy, as at the San Clemente checkpoint, the vehicle will be actually directed off the highway) for inquiries to be made by the agent. If the agent does not have reason to believe that the vehicle approaching the checkpoint is carrying aliens, he may exchange salutations, or merely wave the vehicle through the checkpoint.

If, after questioning the occupants, the agent then believes that illegal aliens may be secreted in the vehicle (because of a break in the "pattern" indicating the possibility of smuggling) he will inspect the vehicle by giving a cursory visual inspection of those areas of the vehicle not visible from the outside (i. e., trunk, interior portion of camper, etc.).

At the point of location of the sites now in regular use few aliens have reached the locale on foot, with 99% having entered a vehicle of one type or another. Approximately 12% of all apprehensions of deportable aliens throughout the nation are made at checkpoints.

In the United States, during fiscal 1973, approximately 55,300 deportable aliens were apprehended by Border Patrol agents working traffic checking operations. In the Chula Vista sector the number for that period was 21,232, while in the El Centro sector the total was 3,825.[4]

[4] Apparently apprehensions other than those actually made at the checkpoint are included in these figures, but they are a representation of the total activity at these checkpoints and the majority of apprehensions included therein are made at the checkpoints [R. T. 274, 396].

During fiscal 1973, a total of 4,975 of the above were visitors apprehended at the checkpoints and a majority of these were those who were in violation of the terms of temporary border passes (Form I–186).

The placement of the checkpoint and their operations are coordinated between the two sectors located in this district and with Border Patrol activities to the east in Arizona. In actual operation the checkpoints, be they "permanent" or "temporary," have the same basic accouterments. Typically, about one-half mile to one mile south of the checkpoint is the first notification that the checkpoint is ahead. The notice is in the form of a black on yellow sign indicating "STOP AHEAD" which has floodlights for nighttime illumination, *Handbook*, at 9–9. Next, about 200 yards from the checkpoint is another sign cautioning the traffic to slow down or to be careful; this sign usually has flashing yellow lights attached. For the fifty yards directly south the checkpoint there are placed traffic cones evenly spaced along each side of the highway. The actual checkpoint has a sign indicating to the traffic to stop, with official Border Patrol vehicles parked on each side of the stop zone showing the official Border Patrol emblem and/or the designation U. S. OFFICERS. At this point the agents assigned at the "point," in their official uniform, conduct checking and inspection operations. Beyond the checkpoint is usually a sign indicating "THANK YOU."

While a large number of apprehensions are made at the checkpoints each year, as related above, the primary reason for their operation is that they effectively deter large numbers of aliens from illegally entering the country or violating the terms of any temporary crossing card they may have, because they form an effective obstacle and are located on all major routes north out of the border region.

The deterrence aspect of these traffic checkpoint operations is amply demonstrated by the fact that the illegal alien has to resort to the employment of professional smugglers to provide transportation around or through these checkpoints.

Some of these smuggling operations have developed into sophisticated and involved operations with the following general *modus operandi:*

1. Contact is made between the smuggler and the alien prior to the latter's leaving Mexico.

2. The aliens then make entry on foot, with possibly the aid of a "guide," or by use of temporary border passes. Then they enter vehicles approximately 2 or 20 miles inland after having passed through the Border Patrol's line watch activities.

3. To get through the traffic checkpoint they might use a "drop house," which acts as a staging area to keep the aliens awaiting inclement weather, or any event that might cause the checkpoint to close down temporarily. Or, they may use a "decoy" vehicle, which is a vehicle loaded with illegal aliens which it is anticipated will be stopped at the checkpoint and would therefore occupy the agents so that other vehicles could pass through without inspection. They even use "scout cars" to probe those roads where temporary checkpoints are maintained, so as to advise other vehicles whether it is safe to proceed.

4. The "load" vehicles themselves can be of any type of conveyance and the methods used to secret aliens inside them are varied and often show some originality. Unfortunately, sometimes these are very dangerous to the aliens themselves, for it has been reported that it is not at all unusual for an alien to die from asphyxiation while concealed in an automobile trunk or a tank car.

5. The cost of the transportation provided to the aliens is approximately $225 to $250 for each alien for the trip through the checkpoint on to the Los Angeles area. Since smuggling operations are almost exclusively "cash and carry" businesses and the average income among Mexican nationals who may wish to seek residence here illegally is quite small, then this cost tends to act as a very significant deterrent in and of itself. The checkpoints are the major reason for such a high price and if they were discontinued for any length of time it would be one more encouragement to illegal immigration.

The deterrent impact of these checkpoints has been noted on several occasions when they resumed operation unexpectedly and a great number of aliens were apprehended.

The evidence presented before this court clearly establishes that there is no reasonable or effective alternative methods of detection and apprehension available to the Border Patrol, in the absence of the checkpoints for even a geometric increase in its personnel or line watch would not leave any control over those admitted as temporary visitors from Mexico,

Of the approximately half million illegal aliens apprehended in fiscal 1973, virtually none were prosecuted, unless they presented counterfeit or altered documents or aided in smuggling endeavors.

This district has only 3% of the total length of land borders, and yet, fully 30% of all apprehensions of deportable aliens made in the United States are made within this district.

SUPREME COURT OF THE UNITED STATES

No. 74–114

United States, Petitioner, v. Felix Humberto Brignoni-Ponce. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 30, 1975]

MR. JUSTICE DOUGLAS, concurring in the judgment.

I join in the affirmance of the judgment. The stopping of respondent's automobile solely because its occupants appeared to be of Mexican ancestry was a patent violation of the Fourth Amendment. I cannot agree, however, with the standard the Court adopts to measure the lawfulness of the officers' action. The Court extends the "suspicion" test of *Terry* v. *Ohio*, 392 U. S. 56, to the stop of a moving automobile. I dissented from the adoption of the suspicion test in *Terry*, believing it an unjustified weakening of the Fourth Amendment's protection of citizens from arbitrary interference by the police. I remarked then that

> "The infringement of any 'seizure' of the person can only be 'reasonable' under the Fourth Amendment if we require the police to possess 'probable cause' before they seize him. Only that line draws a meaningful distinction between an officer's mere inkling and the presence of facts within the officer's personal knowledge that the person seized has committed, is committing, or is about to commit a crime." *Terry* v. *Ohio*, *supra*, at 38.

The fears I voiced in *Terry* about the weakening of the Fourth Amendment have regrettably been borne out

by subsequent events. Hopes that the suspicion test might be employed only in the pursuit of violent crime—a limitation endorsed by some of its proponents*—have now been dashed, as it has been applied in narcotics investigations, in apprehension of "illegal" aliens, and indeed has come to be viewed as a legal construct for the regulation of a general investigatory police power. The suspicion test has been warmly embraced by law enforcement forces and vigorously employed in the cause of crime detection. In criminal cases we see those for whom the initial intrusion led to the discovery of some wrongdoing. But the nature of the test permits the police to interfere as well with a multitude of law-abiding citizens, whose only transgression may be a nonconformist appearance or attitude. As one commentator has remarked

> "Police power exercised without probable cause is arbitrary. To say that the police may accost citizens at their whim and may detain them upon reasonable suspicion is to say, in reality, that the police may both accost and detain citizens at their whim." Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 395 (1974).

The uses to which the suspicion test has been put are illustrated in some of the cases cited in the Court's opinion. In *United States* v. *Wright*, 476 F. 2d 1027 (CA5 1973), for example, immigration officers stopped a station wagon near the border because there was a spare tire in the back seat. The court held that the officers reasonably suspected that the spare wheel well had been freed in order to facilitate the concealment of aliens. In *United States* v. *Bugarin-Casas*, 484 F. 2d 853 (CA9 1973), the border patrol officers encountered

*See LaFave, "Street Encounters" and the Constitution, 67 Mich. L. Rev. 39, 65–66 (1968).

a man driving alone in a station wagon which was "riding low"; stopping the car was held reasonable because the officers suspected that aliens might have been hidden beneath the floorboards. The vacationer whose car is weighted down with luggage will find no comfort in these decisions; nor will the many law-abiding citizens who drive older vehicles that ride low because their suspension systems are old or in disrepair. The suspicion test has indeed brought a state of affairs where the police may stop citizens on the highway on the flimsiest of justifications.

The Court does, to be sure, disclaim approval of the particular decisions it cites applying the suspicion test. But by specifying factors to be considered without attempting to explain what combination is necessary to satisfy the test, the Court may actually induce the police to push its language beyond intended limits and to advance as a justification any of the ennumerated factors even where its probative significance is negligible.

Ultimately the degree to which the suspicion test actually restrains the police will depend more upon what the Court does henceforth than upon what it says today. If my Brethren mean to give the suspicion test a new bite, I applaud the intention. But in view of the developments since the test was launched in *Terry*, I am not optimistic. This is the first decision to invalidate a stop on the basis of the suspicion standard. In fact, since *Terry* we have granted review of a case applying the test only once, in *Adams* v. *Williams*, 407 U. S. 143, where the Court found the standard satisfied by the tip from an informant whose credibility was not established and whose information was not shown to be based upon personal knowledge. If in the future the suspicion test is to provide any meaningful restraint of the police, its force must come from vigorous review of its applica-

tions, and not alone from the qualifying language of today's opinion. For now, I remain unconvinced that the suspicion test offers significant protection of the "comprehensive right of personal liberty in the face of governmental intrusion," *Lopez* v. *United States*, 373 U. S. 427, 455 (dissenting opinion), that is embodied in the Fourth Amendment.

SUPREME COURT OF THE UNITED STATES

Nos. 74–114 AND 73–2050

United States, Petitioner, 74–114 v. Felix Humberto Brignoni-Ponce.	On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.
United States, Petitioner 73–2050 v. Luis Antonio Ortiz.	

[June 30, 1975]

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACKMUN joins, concurring in the judgment.

Given *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973), with which I disagreed but which is now authoritative, the results reached in these cases were largely foreordained. The Court purports to leave the question open, but it seems to me, my Brother REHNQUIST notwithstanding, that under the Court's opinions checkpoint investigative stops, without search, will be difficult to justify under the Fourth Amendment absent probable cause or reasonable suspicion. In any event, the Court has thus dismantled major parts of the apparatus by which the Nation has attempted to intercept millions of aliens who enter and remain illegally in this country.

The entire system, however, has been notably unsuccessful in deterring or stemming this heavy flow; and its costs, including added burdens on the courts, have been substantial. Perhaps the judiciary should not strain to accommodate the requirements of the Fourth Amendment to the needs of a system which at best can demonstrate only minimal effectiveness as long as it is lawful

for business firms and others to employ aliens who are illegally in the country. This problem, which ordinary law enforcement has not been able to solve, essentially poses questions of national policy and is chiefly the business of Congress and the Executive Branch rather than the courts.

I concur in the result in these two cases.